

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of

**Proceedings Of The Copyright Royalty
Board; Violation Of Standards Of
Conduct**

Docket No. 17-CRB-0013-RM

REPLY COMMENTS OF MPAA AND PROGRAM SUPPLIERS

On June 26, 2017, the Copyright Royalty Judges (“Judges”) issued a Federal Register Notice (“Notice”),¹ seeking reply comments responding to the initial round of comments filed in this proceeding in response to the Judges’ April 20, 2017 Notice of Proposed Rulemaking (“NOPR”). Pursuant to the Notice, the Motion Picture Association of America, Inc. (“MPAA”), on behalf of its member companies and other producers and/or distributors of syndicated series, movies, specials, and non-team sports broadcast by television stations who have agreed to representation by MPAA (“Program Suppliers”), submits the following Reply Comments.²

MPAA’s Reply Comments are divided into three parts. The first part responds to the Judges’ request for detailed comments regarding some of the incidents of misconduct perpetrated in proceedings before the Judges and their predecessors by Raul Galaz, Worldwide Subsidy Group LLC d/b/a Independent Producers Group (“IPG”), and their aliases. It further explains why proceeding-specific sanctions imposed by the Judges have not been sufficiently impactful in protecting the overall integrity of the statutory licensing scheme from abuse that now spans

¹ See 82 Fed. Reg. 28800 (June 26, 2017).

² Program Suppliers joined the initial comments filed in this proceeding by the Allocation Phase Parties, and continue to support those comments. See Allocation Phase Parties’ Comments at 1, n.1. (May 22, 2017). Program Suppliers are also a signatory to the separate joint reply comments submitted by the Allocation Phase Parties in this proceeding, and support those comments.

decades. The second part addresses the legal arguments advanced by IPG and explains why those arguments lack merit. The third part addresses the concerns about scope and potential abuses of the proposed rule raised by the Music Community Participants and explains how the language changes proposed by the Allocation Phase Parties in their initial comments helps mitigate these concerns.

Compulsory license proceedings before the Judges often involve many of the same parties, issues, witnesses, and counsel. Although the Judges have issued evidentiary and procedural sanctions to address misconduct by party representatives in the past, those rulings have been limited to the record of the particular proceeding before the Judges, and have not addressed repeated instances of misconduct by the same parties, counsel, witnesses, or individuals over the course of multiple proceedings. When a particular party representative, witness, or counsel appears regularly before the Judges in multiple dockets and regularly engages in misconduct, such actions must be dealt with. Left unchecked, such misconduct wastes judicial resources, burdens the resources of compliant participants, and threatens the overall integrity of the statutory licensing system as a whole. The Judges' proposed rule attempts to solve this problem, as it is designed to address not merely a party's conduct within the confines of a particular proceeding, but also to address conduct that constitutes patterns or practices of misconduct over multiple proceedings. MPAA applauds the Judges for their efforts to protect the integrity of the statutory licensing system from ongoing misconduct, and supports the adoption of a new regulation governing standards of conduct.

I. Past Incidents Of Misconduct Referenced In The NOPR, The Responses Of The Judges And Their Predecessors, And Why They Have Not Solved The Problem

The Notice specifically directs the parties to provide the Judges with "detailed comments regarding the incidents to which the Judges referred in the [NOPR]" or any others that the parties

might be aware of, and explain the sanction that the Judges or their predecessors applied (if any), and comment on whether the remedies used “adequately addresses those incidents or whether gaps in the current remedial framework might lead to future incidents that could compromise public confidence in the CRB ratemaking and royalty distribution system.”³ As requested by the Judges, MPAA provides detailed comments regarding some of the incidents of misconduct involving Raul Galaz, IPG, and their various aliases, and the action taken by the Judges or their predecessors in response to that conduct (if any), below.

A. The Prior Criminal Conviction And Sentencing Of Raul Galaz

In their NOPR, the Judges made reference to the criminal conviction of Raul Galaz, which occurred during the era of the Copyright Arbitration Royalty Panel (“CARP”).⁴ As the Judges summarized, Mr. Galaz “pled guilty to a count of mail fraud for making fraudulent submissions to the Copyright Office (“Office”) in which he used false aliases and fictitious business entities to claim entitlement to cable and satellite retransmission royalties” and then “[a]fter serving a prison term, and with approval of the sentencing court, the sanctioned individual continued to represent claimants in proceedings before the CRB.”⁵ Although not mentioned by the Judges in the NOPR, Mr. Galaz also admitted as a part of his plea agreement that he lied under oath before the CARP during the 1997 Cable Phase II Royalty Distribution Proceeding (“1997 Cable Proceeding”).

Aside from Mr. Galaz’s mail fraud and perjury offenses, which came to light only after the Librarian of Congress’ (“Librarian”) decision in the 1997 Cable Proceeding, Mr. Galaz and IPG also had another remarkable infraction in that proceeding. During that proceeding, the

³ Notice, 82 Fed. Reg. at 28801.

⁴ See NOPR, 82 Fed. Reg. 18601, 18601-02 (April 20, 2017).

⁵ See *id.*

Librarian found that Mr. Galaz, who appeared as a witness and principal of IPG, in flagrant violation of the existing regulations, filed a joint cable claim on behalf of IPG, identified only IPG's alias (Artist Collections Group, LLC) as a joint claimant, and failed to identify any copyright owners that IPG or its alias purported to represent.⁶ The Register of Copyrights ("Register") determined that IPG's joint claim was effectively a placeholder claim — that is, a claim that stood in place of unidentified joint claimants — and was therefore impermissible under Section 111.⁷ Although the Register could have dismissed IPG's placeholder claim, she did not.⁸ Instead, she made a "one-time exception" to the Office's rules, and allowed IPG to submit evidence to the CARP to allow the CARP to make a factual determination regarding which entities IPG actually represented as of July 31, 1998, the filing deadline for submitting 1997 cable claims.⁹ Ultimately, following consideration of the sparse documentary evidence submitted by IPG, the Librarian determined that IPG represented only one out of the sixteen entities that IPG originally claimed to represent in its written direct case in the 1997 Cable Proceeding.¹⁰

While Mr. Galaz was indeed prosecuted and convicted for felony mail fraud following the conclusion of the 1997 Cable Proceeding,¹¹ no substantive, procedural, or evidentiary sanction was ever imposed by the CARP or the Office against Mr. Galaz or any of his companies in the course of the 1997 Cable Proceeding for his criminal actions or his false testimony before

⁶ See Order, Docket No. 2000-2 CARP CD 93-97 at 6-7 (June 22, 2000) ("June 22, 2000 Order").

⁷ See *id.* at 7 ("Worldwide Subsidy Group did not comply with the rules for the filing of joint claims. Because of this failure, IPG's case could be dismissed."); Order, Docket No. 2000-2 CARP CD 93-97 at 3-4 (September 22, 2000) ("September 22, 2000 Order")

⁸ June 22, 2000 Order at 7.

⁹ See *id.*; see also September 22, 2000 Order at 3-4.

¹⁰ See 66 Fed. Reg. 66433, 66454 (December 26, 2001).

¹¹ See *U.S. v. Galaz*, D.D.C. No. 02-230.

the CARP. Instead, following Mr. Galaz's conviction, the 1997 Cable Proceeding was resolved via a three-party settlement among IPG, MPAA, and the Librarian while Mr. Galaz was incarcerated.¹²

It is incorrect for Mr. Galaz and IPG to characterize the proposed rule as an attempt to impose sanctions on Mr. Galaz and IPG that have already been rejected by Judge Henry H. Kennedy in Orders issued in Mr. Galaz's criminal proceeding.¹³ MPAA has first-hand familiarity with the events surrounding Mr. Galaz's conviction, because MPAA was both a participant in the 1997 Cable Proceeding and one of Mr. Galaz's victims. On September 16, 2002, in connection with Mr. Galaz's sentencing, MPAA submitted its own detailed victim impact statement to Judge Kennedy, attached hereto as Exhibit A, explaining the very significant losses that MPAA suffered due to Mr. Galaz's criminal activities and IPG's misconduct, and sought a restitution award from the court as a part of Mr. Galaz's criminal sentence in the amount of \$1.7 million. The Office also submitted a victim impact statement to Judge Kennedy explaining the irreparable harm that Mr. Galaz had caused to the statutory licensing scheme, a copy of which is attached hereto as Exhibit B. As a part of that statement, the Office stated as follows:

Furthermore, the Office has reason to believe that Mr. Galaz is continuing to conduct business in the usual course. On the day before his plea hearing, Mr. Galaz was at the Office examining cable and satellite claims. In order to better ensure that Mr. Galaz does not again wreak havoc on the claims filing system and given the administrative costs associated with his future participation in distribution proceedings, the Office also requests that the Court ban Mr. Galaz or any entity in which he has an interest from filing with the Office future cable or satellite claims and from pursuing claims which he or such entities have already

¹² See 69 Fed. Reg. 23821, 23822 (April 30, 2004).

¹³ See Galaz Comments at 7-9, 11-12, 20; IPG Comments at 7-10, 24, 27, 34.

filed. The Office requests that such a ban be imposed as a part of his sentence and/or as a condition of his supervised release.¹⁴

Mr. Galaz and IPG both filed initial comments in this proceeding suggesting that Judge Kennedy “strongly rebuked” and “expressly rejected” the Office’s victim impact statement request when he sentenced Mr. Galaz on November 15, 2002.¹⁵ However, that characterization is inaccurate. Instead, Judge Kennedy ruled as follows:

THE COURT: It’s not unusual that this Court is in the position of rendering a sentence that does not fully serve any one’s interests. So be it. That is how the sentencing regime works.

Mr. Galaz, I don’t know—there are two separate pictures painted of you. One is of a person who made one bad mistake. Mr. Ellerman I think was correct and pointed out several things you did, the several criminal acts you did originated from one scheme. But to be sure there were several things over an extended period of time including lying before the Copyright Arbitration Review Panel and this from a person who unlike most of the people who come before me has had the best of everything.

And I, as I indicated, I read your wife’s letter, a very, very, very articulate letter explaining something about your background and how you weren’t born with a silver spoon in your mouth. I have no reason to doubt anything that’s said. But I can’t—it’s simple beyond dispute that the people who come before me and, indeed, the people who just travel this earth you are a favored person. And to use your privilege the way you did is just awful and harmful, harmful in a way that no sentence is going to be able to really compensate for.

The Court will not impose restitution in any amount other than that agreed upon. The Court has considered MPAA’s letter and statement of loss. To attempt to fully compensate those injuries or loss is beyond the scope of this proceeding and the Court simply will not do that. The Court, again, though understands that there is a lot of loss here that Mr. Bowne talks about—the damage to the system. That simpl[y] can’t be repaired, period.¹⁶

¹⁴ See Exhibit B at 3.

¹⁵ See Galaz Comments at 8; IPG Comments at 7-10.

¹⁶ See *U.S. v. Galaz*, 02-230, Galaz Sentencing Tr. at 12-13 (November 15, 2002).

As the foregoing passage makes clear, Judge Kennedy did not “rebuke” either MPAA’s full restitution request or the Office’s request for the imposition of safeguards to protect the integrity of the statutory licensing scheme during Mr. Galaz’s supervised release period. Instead, he merely observed that MPAA’s full restitution request was “beyond the scope” of the criminal proceeding, and that the damage to the statutory licensing system that U.S. Attorney Bowne referenced “simpl[y] can’t be repaired, period.”¹⁷ Moreover, contrary to Mr. Galaz’s assertion, Judge Kennedy clearly did not fashion a sentence that somehow took into account “the fact that [Mr. Galaz] was an acknowledged expert in the field of retransmission royalties.”¹⁸

Judge Kennedy went on to award MPAA restitution from Mr. Galaz in the amount of \$328,303.00,¹⁹ and imposed a condition in Mr. Galaz’s sentence that “Mr. Galaz shall file no further claims with the U.S. Copyright Office unless he presents written authorization from the company verifying his representation.”²⁰ When asked to revisit the issue of conditions to be imposed during Mr. Galaz’s period of supervised release a few years later, Judge Kennedy similarly clarified the scope of his ruling, ordering that it “must be interpreted and implemented in accordance with the plain meaning of the words employed to express it” and clarifying that any conditions he imposed were limited to Mr. Galaz’s supervised release period—which has now concluded.²¹ Judge Kennedy’s Orders never foreclosed further disciplinary action against Mr. Galaz or IPG by other bodies.

¹⁷ *See id.*

¹⁸ *See Galaz Comments* at 8.

¹⁹ To date Mr. Galaz has only paid back portion of these funds to MPAA, and over \$222,000 remains outstanding.

²⁰ *See U.S. v. Galaz*, 02-230, Galaz Sentencing Tr. at 14.

²¹ *See Order, U.S. v. Galaz*, 02-230 (D.D.C. January 27, 2006).

Mr. Galaz's comments go to great lengths to cast blame for his criminal acts on everyone (and anyone) other than himself. Indeed, Mr. Galaz blames the copyright owner who rejected him as an agent for his decision to file his first false claim—which he filed “out of irritation.” He then blames MPAA for paying him royalties, suggesting that he had to continue to file false claims and deposit the checks he received from MPAA in error to avoid calling “unnecessary attention” to the situation. When recounting his actual conviction and sentencing, Mr. Galaz blames Enron Corporation and Attorney General John Ashcroft for the time he served in prison.²² With remorse so conspicuously absent from Mr. Galaz's comments, his and IPG's subsequent incidents of misconduct should not be surprising.

B. The 2000-2003 Cable Phase II Proceeding

Notwithstanding the concerns expressed by MPAA and the Office in their victim impact statements, the Office did not take any administrative steps to sanction or disqualify Mr. Galaz or IPG from participating in royalty distribution proceedings in the wake of Mr. Galaz's criminal conviction. The only remedial action taken by the Office was promulgate new regulations governing the filing of cable and satellite royalty claims.²³ As a result, both during his prison term and following his release from prison, Mr. Galaz continued working for IPG on statutory license matters. In fact, during his incarceration, he drafted an appellate brief for IPG to use in connection with its pending D.C. Circuit appeal of the 1997 Cable Proceeding.²⁴ IPG also

²² See Galaz Comments at 5-6.

²³ See *Cable and Satellite Statutory Licenses*, Docket No. RM 2001-3 CARP, 66 Fed Reg. 20958, 20961 (April 26, 2001); 66 Fed. Reg. 29700, 29701 (June 1, 2001).

²⁴ A copy of correspondence from IPG's attorney, Mr. Brian Boydston, acknowledging that Mr. Galaz wrote an appellate brief for IPG while in prison is attached hereto as Exhibit C. Although he initially attempted to deny his ongoing involvement in IPG, Mr. Galaz eventually confirmed under oath that he wrote an appellate brief for IPG while he was incarcerated and continued acting as an IPG advisor and consultant during that period. See *WSG, LLC, et al. v. MPAA*, Cal. Case No. BC 389895, Raul Galaz Deposition Tr. at 61-63, 86-87, 90-91, and 104-09 (February 12, 2010), excerpts attached hereto as Exhibit D.

continued appearing before the Judges in cable and satellite royalty distribution proceedings as a claims representative.

In the 2000-2003 Cable Phase II proceeding, Mr. Galaz testified once again for IPG. In that proceeding, the Judges imposed evidentiary sanctions on IPG after IPG's counsel and Mr. Galaz both conceded during the preliminary hearing that IPG withheld discovery documents that negated IPG's assertions that it was authorized to represent its claimants.²⁵ Although MPAA sought to have IPG's joint claims in that proceeding dismissed in their entirety due to the large number of unauthorized entities that appeared on them, the Judges declined to do so. Instead, the Judges considered IPG's claimants individually during a preliminary hearing, and dismissed a significant number of IPG-represented claimants from some or all of the 2000-2003 cable royalty years.²⁶ On appeal, the D.C. Circuit upheld the Judges' evidentiary sanctions and dismissal rulings.²⁷

Although the Judges' case-specific sanctions in the 2000-2003 Cable Phase II Proceeding allowed that case to be litigated to its conclusion as to the Program Suppliers and Sports categories, the Judges' decision to weigh and consider evidence (or the lack thereof) for each unauthorized IPG-represented claimant in a preliminary hearing imposed a significant burden on both the parties and the Judges, and unduly increased the cost of the proceeding. Moreover, because the Judges' rulings in the 2000-2003 Cable Phase II Proceeding were evidentiary-based decisions flowing from the record in that proceeding (as opposed to rulings directed at Mr. Galaz

²⁵ See Docket No. 2008-2 CRB CD 2000-2003 (Phase II), Preliminary Hearing Tr. at 260:13-16, 269:3-22, 270:1-2 (Boydston); Tr. at 574:7-17, 583:9-22, 584:1-22, 585: 1-14 (Galaz); *see also Order On IPG Motions For Reconsideration Of Evidentiary Rulings*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 2-5 (January 11, 2013).

²⁶ See *Memorandum Opinion And Order Following Preliminary Hearing On Validity Of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 2-5 and Ex. A-B (March 21, 2013).

²⁷ See *Indep. Producers Grp. v. Librarian of Cong.*, 792 F.3d 132, 138-42 (June 30, 2015).

or IPG's pattern of misconduct over several proceedings), the Judges' rulings were limited to that particular proceeding, leaving both Mr. Galaz and IPG free to continue to conduct themselves inappropriately in future proceedings, which is precisely what has happened.

C. The 2004-2009 Cable And 1999-2009 Satellite Phase II Proceedings

In the 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding, the Judges conducted another preliminary hearing to evaluate claims challenges. Once again, the process required MPAA and other similarly situated parties to put on evidence demonstrating the invalidity of many IPG-represented claims — a significant number of which claims had already been invalidated previously in the 2000-2003 Cable Phase II Proceeding. During the preliminary hearing in that proceeding, Mr. Galaz testified once again for IPG, and there was ample evidence in the record of IPG's misconduct, including affidavits from *eight different entities* that IPG claimed to represent disavowing IPG as their agent,²⁸ a notice from Feed The Children, Inc. informing the Judges that IPG had filed royalty claims on its behalf without authority,²⁹ and oral testimony from Walter Kowalski of Bob Ross, Inc., who explained that IPG had collected royalties for Bob Ross' programs in the Public Television category and converted them.³⁰

Despite these very significant acts of misconduct, the Judges only revoked the presumption of validity afforded to IPG's claims due to (1) the inclusion of a fictitious entity, Tracee Productions, on IPG's 1999 satellite claims filed by Mr. Galaz; and (2) Mr. Galaz's false

²⁸ See Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II), MPAA Exhibit Nos. 324-332 (Affidavits from A&E Television Networks, LLC; BBC Worldwide Americas, Inc.; Beyond International, Limited; Devillier Donegan Enterprises LP; Golden Films; Pacific Family Entertainment; LATV Networks, LLC; and Worldwide Pants, Inc.).

²⁹ See Feed The Children Inc.'s Notice Concerning Representation And Motion To Substitute Representative, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) (November 26, 2014).

³⁰ See Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II), Preliminary Hearing Tr. at 208-82 (Kowalski).

testimony regarding IPG's 2008 satellite claim during the preliminary hearing.³¹ The Judges also dismissed many of IPG's unauthorized claims.³² Later in that same proceeding, the Judges issued an order admonishing IPG for its failure to effect proper service of process on the other parties to the proceeding.³³ On January 10, 2017, the Judges also solicited motions from parties in that proceeding to address whether IPG should be sanctioned for its intentional filing of a defective Amended Written Direct Statement that its counsel admitted he never reviewed or considered prior to submission, in clear violation of the Judges' regulations.³⁴

As the foregoing demonstrates, over the course of the consolidated 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding it has become clear that Mr. Galaz, IPG, and its counsel are engaged in an ongoing practice of willfully disregarding the Judges' rules and orders.³⁵ Although the Judges have clear authority to dismiss a party from a proceeding for such ongoing procedural misconduct,³⁶ thus far they have shown restraint and have not yet exercised that authority. While dismissal might constitute a case-specific sanction significant enough to deter future acts of misconduct, it is clear that the other case-specific, evidentiary-based sanctions imposed thus far by the Judges, as well as the revocation of presumptions, are insufficient to

³¹ See *Memorandum Opinion And Ruling On Validity Of Claims*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 7-10 (March 13, 2015) ("March 13, 2015 Order"). Both IPG and Mr. Galaz seek to re-litigate the Judges' decisions on these issues in their comments. See Galaz Comments at 19-22; IPG Comments at 11-18.

³² See *id.* at 28-45, Ex. A-1 and A-2.

³³ See *Order Admonishing IPG*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2017-2 CRB SD 1999-2009 (Phase II) at 1-2 (January 3, 2017).

³⁴ See *Order On IPG Motion For Leave To File Amended Written Direct Statement*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2017-2 CRB SD 1999-2009 (Phase II) at 2, n.4, and 7 (January 10, 2017).

³⁵ Indeed, the 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding still remains unresolved, and the methodology hearing in the case has been delayed more than a year due to IPG's shenanigans. See *Order Rescheduling Hearing*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2017-2 CRB SD 1999-2009 (Phase II) at 1 (January 10, 2017).

³⁶ See Allocation Phase Parties' Comments at 1-2; see also Motion To Strike Multigroup Claimants' Purported Written Direct Statements And To Dismiss Multigroup Claimants From The Distribution Phase, Docket Nos. 14-CRB-0010-CD (2010-13) and 14-CRB-0011-SD (2010-13) at 8-11.

protect the integrity of the statutory licensing scheme from ongoing and repeated acts of misconduct.

D. The 2010-13 Cable And Satellite Proceedings

In the 2010-13 Cable and Satellite Proceedings, IPG appeared in the proceedings under the auspices of two newly-formed aliases: Multigroup Claimants (“MC”) and Spanish Language Producers (“SLP”)—both of which are registered assumed names for Mr. Galaz’s father Alfred Galaz (who also is a part-owner of IPG). As MPAA explained in its pending Motion For Disallowance Of Claims Made By Multigroup Claimants (“MPAA Motion”), it is clear that IPG created MC and SLP simply to impose an additional layer of agency to shield itself from the Judges’ case-specific sanctions.³⁷ Indeed, IPG knew this misguided scheme would flout the Judges’ rules. Prior to IPG putting the scheme in place, it signaled its intention to do so in the consolidated 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding, and the Judges put IPG on notice at that time that “such a transparent subterfuge could well constitute fresh and sufficient evidence to cast doubt on IPG’s representation, underscoring the need to place the burden on IPG to substantiate its claims.”³⁸ IPG employed the scheme regardless of the Judges’ admonition.

The fact that IPG could so boldly disregard the Judges’ warning illustrates the limited deterrent impact that the Judges’ case-specific sanctions have on repeat offenders. Indeed, MC has continued IPG’s practice of disregarding the Judges’ regulations and orders in the 2010-13 Cable and Satellite Proceedings by (1) failing to file an Allocation Phase Written Direct Statement in the 2010-13 Cable Proceeding *at all*, and (2) failing to file Distribution Phase Written Direct Statements that comply with the Judges’ regulations. As MPAA, JSC, and SDC

³⁷ See MPAA Motion, Docket No. 14-CRB-0010-CD (2010-13) at 9-10.

³⁸ See 82 Fed. Reg. at 18602 (citing March 13, 2015 Order at 12-13, n.14).

recently pointed out in their pending motion to dismiss MC from the Distribution Phase of both proceedings, MC's failure to follow the Judges' rules and orders has placed it in default, and subjects MC to mandatory automatic dismissal from both phases of the proceedings.³⁹

It is clear that the Judges do not need to promulgate procedural regulations to dismiss MC from the 2010-13 Cable and Satellite proceedings for procedural default and misconduct, and the Judges should do so swiftly.⁴⁰ However, even if the Judges dismiss MC from the 2010-13 Cable and Satellite Proceedings, that ruling would remain limited to those proceedings, and would do little to protect the statutory licensing scheme as a whole for future abuse from Mr. Galaz, IPG, MC, SLP, or other bad actors. As a result, MPAA believes that regulations governing standards of conduct are warranted, and should be adopted.

II. The Legal Arguments Made In IPG's Comments Are Simply Red Herrings.

As the Allocation Phase Parties noted in their initial comments, the Judges have broad authority under the Copyright Act ("Act") to impose sanctions, and also to promulgate regulations to permit them to carry out their functions under the Act.⁴¹ In addition, the U.S. Supreme Court has found that quasi-judicial federal agencies have inherent authority to set rules regarding acceptable standards of conduct for the party representatives that appear before them, and that no explicit grant of authority by Congress is required as a prerequisite to promulgating such rules.⁴² Indeed, numerous federal agencies have adopted rules governing standards of conduct, and both the adoption and the application of those rules to discipline party

³⁹ See Motion To Strike Multigroup Claimants' Purported Written Direct Statements And To Dismiss Multigroup Claimants From The Distribution Phase, Docket Nos. 14-CRB-0010-CD (2010-13) and 14-CRB-0011-SD (2010-13) at 8-11.

⁴⁰ See *id.* at 8-10.

⁴¹ See Allocation Phase Parties' Comments at 1-2.

⁴² See *Goldsmith v. United States Bd. Of Tax Appeals*, 270 U.S. 117, 121 (1926).

representatives has been upheld by the courts.⁴³ Accordingly, the Judges are well within their authority to promulgate the regulation set forth in the NOPR.

IPG raises a series of legal arguments challenging the Judges' authority to promulgate regulations governing standards of conduct. These arguments range from Constitutional challenges to suggesting that the Judges' proposed rule would violate non-binding EEOC guidelines or the Federal Rules of Evidence. However, as explained below, none of these arguments withstand scrutiny.

A. IPG's Constitutional Arguments Are Misplaced.

IPG's comments argue at length that the Judges' proposed rules are designed to create an absolute bar or prohibition on certain classes of individuals, and cite multiples cases suggesting that an absolute bar on a particular class violates the equal protection clause of the Constitution.⁴⁴ IPG also argues in a cursory fashion that the Judges' proposed regulation will violate the substantive due process of an individual (presumably Mr. Galaz), and that the proposed rule is an unconstitutional bill of attainder.⁴⁵ However, IPG's arguments are misplaced.

Indeed, all of the equal protection and substantive due process cases cited by IPG are off-point, as they concern an absolute prohibition from employment based on a felony conviction.⁴⁶ In sharp contrast, the Judges' proposed rule does not contain the potential constitutional problem of an across-the-board disqualification from employment. Instead, the proposed rule provides only that the Judges "may" suspend or debar a representative, agent, attorney, or witness in

⁴³ See, e.g., *Sicigano v. United States*, 127 F. Supp. 2d 325, 331-33 (D. Ct. 2001); *Checkosky v. SEC*, 23 F.3d 452, 455-56 (D.C. Cir. 1993); *Davy v. SEC*, 792 F.2d 1418, 1421-23 (9th Cir. 1986); *Polydoroff v. Interstate Commerce Com.*, 773 F.2d 327, 374-75 (D.C. Cir. 1985); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 580-82 (2d. Cir. 1979).

⁴⁴ See IPG Comments at 19-24.

⁴⁵ See *id.* at 25-27.

⁴⁶ See *id.* at 19-24 (citing *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977); *Kindem v. Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980)).

certain circumstances, including the commission of certain crimes. The proposed rule does not automatically disqualify any individual with a criminal conviction, but properly leaves the decision to suspend or debar in the discretion of the Judges based on all of the circumstances. Moreover, given the fact that any sanction imposed under the Judges' proposed rule would only be applied *after a hearing*, and presumably only when the Judges conclude that the particular conduct at issue was so severe that it threatens the integrity of the Judges' proceedings, it is unclear how the proposed rule could violate substantive due process.

IPG's bill of attainder argument also falls flat. Contrary to IPG's suggestion, the Judges' proposed rule does not name Mr. Galaz (or any other individual) as a person to whom it would apply. Instead, the Judges make reference generally in the NOPR to several prior instances of misconduct before the Judges and their predecessors that resulted in case-specific sanctions, including misconduct by Mr. Galaz, IPG, and others. The Judges' proposed rule does not seek to punish any of those actors for past incidents of misconduct without the provision of a judicial trial. Indeed, the proposed rule specifically mandates that the Judges hold a hearing before imposing suspension or debarment. IPG's comments completely ignore the Judges' mandatory hearing requirement that would come as a prerequisite to any suspension or debarment order.

B. The Proposed Rule Does Not Violate EEOC Guidelines.

EEOC guidelines are not only non-binding, they have no application whatsoever to proceedings before the Judges. As an initial matter, in general, EEOC rules apply only within the context of labor and employment law. Clearly, the relationships between the Judges and the parties that appear before them are not employer-employee relationships. It strains credulity to even draw on EEOC rules.

Assuming, *arguendo*, that EEOC guidelines regarding use of criminal convictions in employment decisions apply here, it is clear that the proposed rule does not violate them. EEOC

guidelines do not provide that criminal convictions cannot or should not be considered in employment decisions under Title VII of the Civil Rights Act of 1964. They provide only that consideration of criminal convictions should be “job related for the position in question and consistent with business necessity” and that the criminal conviction bears a “demonstrable relationship to successful performance of the jobs for which it was used.”⁴⁷ The proposed rule properly allows the Judges to take such considerations into account in deciding whether or not to impose suspension or debarment, especially in the case of criminal convictions involving fraud or dishonesty.

C. The Judges Are Not Required To Adhere To The Federal Rules Of Evidence.

IPG claims that the Judges’ proposed rule violates Federal Rules of Evidence 601 and 609, which govern the competency of witnesses and impose limitations on the means by which a criminal conviction can be used to impeach a witness’ credibility. However, the Judges’ regulations make it clear that proceedings before the Judges are not governed by the Federal Rules of Evidence. Indeed, the regulations state that “All evidence that is relevant and not unduly repetitious or privileged, shall be admissible. Hearsay may be admitted to the extent deemed appropriate by the Copyright Royalty Judges.”⁴⁸ The regulations also specifically permit the Judges to “limit the number of witnesses or limit questioning to avoid cumulative testimony.”⁴⁹ There are no regulations imposing any limitations on the means by which a prior criminal conviction can be used to impeach the credibility of a witness. Instead, such matters are left to the Judges’ discretion, under their statutory authority to “make any necessary procedural and

⁴⁷ U.S. Equal Employment Opportunity Comm’n, Enforcement Guideline No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII Of The Civil Rights Act of 1964 (2012) at ¶ V.B.1.

⁴⁸ See 37 C.F.R. § 351.10 (a).

⁴⁹ See, e.g., 37 C.F.R. § 351.10(b).

evidentiary rulings in any proceeding under this chapter.”⁵⁰ While the Judges have sometimes relied on the Federal Rules of Evidence as persuasive authority in the course of making their evidentiary rulings, the foregoing statutory and regulatory citations make it clear that they have no obligation to do so. Accordingly, IPG’s arguments regarding the scope and application of Federal Rules of Evidence 601 and 609 should be disregarded.

D. The Judges’ Proposed Rules Regarding Attorney Conduct Are Not Arbitrary.

IPG opposes the Judges’ proposed rule as it would apply to attorneys practicing before the Judges, arguing that the proposed prohibition on “incompetent or disreputable” counsel is overbroad.⁵¹ However, such a rule is not unprecedented. Both the Internal Revenue Service (“IRS”) and the U.S. Patent and Trademark Office (“PTO”) have similar standards in place governing the conduct of attorneys.⁵² IPG does not (and, indeed, cannot) articulate any reason why the Judges are not equipped to administer the same legal standard for attorney conduct that is currently in use by other agencies.

III. The Music Community Participants’ Concerns Over Scope And Abuse Are Addressed By The Modifications Proposed In The Allocation Phase Parties’ Comments.

The Music Community Participants filed comments in this proceeding in which they expressed concern over the scope of the proposed rule and the prospect that it could be subject to potential abuse. MPAA disagrees with the Music Community Participants that the proposed rule should be limited to royalty distribution proceedings, in particular because MPAA believes that

⁵⁰ See 17 U.S.C. § 801(c).

⁵¹ See IPG Comments at 33-34.

⁵² See 31 C.F.R. § 10.50 (permitting the Secretary of Treasury to censure, suspend, or disbar any practitioner before the IRS who is found to be “incompetent or disreputable”); 31 C.F.R. § 10:51(a) (defining “incompetent or disreputable”); *see also* 35 U.S.C. § 32 (permitting suspension or exclusion from practice before the PTO of persons found to be “incompetent or disreputable”).

all participants in proceedings before the Judges should be subject to (and expected to adhere to) the same standards of conduct. However, MPAA agrees with the Music Community Participants that the Judges should take appropriate steps to avoid abuse of the proposed regulation by participants seeking to gain a tactical advantage over their litigation adversaries,⁵³ and suggests that the language adjustments proposed by the Allocation Phase Parties in their initial comments help meet this goal by making it clear that the Judges should only suspend or debar a participant where their conduct has either “demonstrated a pattern of persistent failure to abide by” the Judges rules or regulations, or “threatens the integrity of the proceedings.”⁵⁴ Further, MPAA does not oppose the Music Community Participants’ suggested modification of proposed Section 350.9(b)(2) to clarify that corporate entities would only be subject to suspension or debarment if they continue to employ a person who is barred from practice before the Judges in a role relating to a proceeding before the Judges.⁵⁵

CONCLUSION

MPAA appreciates this opportunity to provide Reply Comments to the Judges in this proceeding in response to the Notice, and urges the Judges to adopt their proposed rule, incorporating both the technical amendments proposed by the Allocation Phase Parties and the clarification to Section 350.9(b)(2) proposed by the Music Community Participants in their initial comments.

⁵³ See Music Community Participants Comments at 6.

⁵⁴ See Allocation Phase Parties’ Comments at 5.

⁵⁵ See Music Community Participants Comments at 16, n.8.

Respectfully submitted,

/s/ Lucy Holmes Plovnick

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Dated: July 26, 2017

*Attorneys for
MPAA and Program Suppliers*

EXHIBIT A



MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966
FAX: (202) 785-3026

MARSHA E. KESSLER
VICE PRESIDENT
COPYRIGHT ROYALTY DISTRIBUTION

September 16, 2002

The Honorable Henry H. Kennedy, Jr.
United States District Judge
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: **United States v. Raul C. Galaz, Criminal No. 02-230**

Dear Judge Kennedy:

Please accept this letter as the Victim Impact Statement of the Motion Picture Association of America ("MPAA") regarding the harm caused to MPAA individually, and the interests of the cable and satellite copyright royalty system as a whole, by the fraudulent conduct of Raul C. Galaz. I am the Vice President for Retransmission Royalty Distribution for the MPAA. My job is to assist rightful claimants in the distribution of payments for cable and satellite compulsory license fees collected by the Copyright Office ("Royalty Fund") from cable and satellite operators in the United States. I will attend the sentencing hearing scheduled for October 4, 2002 at 9:30 a.m. and can amplify on any matter contained herein by live testimony, and I will assist the court with any questions it may have regarding the following information.

I. INTRODUCTION

Under Sections 111 and 119 of the Copyright Act, cable systems and satellite carriers are allowed to retransmit broadcast television programming without the permission of the program's copyright owners, conditioned on the operators' payment of compulsory fees. These royalty fees are intended to compensate program owners for the use of such programming. After funds have been paid to the Copyright Office, copyright owners make claims to the Royalty Fund by filing claims with the Copyright Office.

After claims have been filed, unless an agreement is reached between the interested parties concerning the distribution of the royalties, proceedings are conducted to allocate and distribute the Royalty Fund to interested parties pursuant to the statute and the rules and regulations of the Copyright Office. These proceedings are formal arbitration proceedings conducted by the Copyright Arbitration Royalty Panel ("CARP"),

a statutorily created arbitration panel. MPAA-represented parties, who are producers and syndicators of television programming including movies, series and special programming, receive approximately fifty to sixty percent of the Royalty Fund administered by the Copyright Office. During the years in question, total annual deposits ranged between \$154 million and \$177 million. Although the Copyright Office maintains the Royalty Fund received by calendar year (i.e. year of retransmission), distribution proceedings often cover more than one year, meaning that hundreds of million of dollars are often at stake in these proceedings.

II. THE DISTRIBUTION PROCEEDINGS

Claimants to the Royalty Fund must file their claims by July 31st of the year following the royalty year for which cable and satellite operators are required to pay royalties. If a claim is not mailed by that date, the claimant cannot participate in the distribution of the Royalty Fund. The veracity of the filed claims is, to a large degree, assumed, and the Copyright Office has few resources to independently verify the *bona fides* of each claim.¹ Accordingly, false or fraudulent claims are difficult to detect and, if undetected, can wreak havoc on the largely self-policing system.

Once claimants have been established, the proceedings are divided into phases. Under Phase I, the Royalty Fund is allocated between claimant groups, which include (1) program suppliers (of which MPAA represents all claimants in the category), (2) sports programming, (3) commercial and non-commercial broadcasters, (4) devotional or religious programming, (5) musical programming, (6) Canadian programming, and (7) National Public Radio. If controversies exist within each claimant group after the Phase I allocation, Phase II proceedings are conducted for each claimant group to determine the amount to be allocated within that group. Pursuant to Sections 111 and 119 and rules and regulations of the Copyright Office, a panel of arbitrators (the CARP) is selected to hear evidence and make an arbitration award regarding controversies under either Phase I or Phase II.

III. MR. GALAZ'S ACTIVITIES

On June 20, 2002, Mr. Galaz admitted filing false 1994 and 1995 royalty claims under the name "Tracee Productions" for the program entitled "Garfield and Friends." Based on these specific fraudulent filings, MPAA paid \$328,000 to Mr. Galaz – funds to which he was not entitled. Unfortunately, the rightful copyright owners of the programs, companies known as "Paws" and "Mendelson Productions," neglected to file royalty claims for the years claimed by Mr. Galaz. Furthermore, the series' syndicator, The Program Exchange, did not notify MPAA that it claimed the show because The Program Exchange was under the impression that Paws/Mendelson had filed the claim. In hindsight, it seems apparent that Mr. Galaz exploited this unfortunate circumstance after

¹ Historically, questions arise only when different claimants made claims to the same programming. Dual claims are easily sorted out by reference to documentation transferring the right to royalties from one party to another.

learning that both parties had failed to assert claims. Even though Paws/Mendelson and The Program Exchange failed to assert claims, the \$328,000 wrongly paid to Mr. Galaz would have been allocated among other MPAA-represented claimants on a *pro rata* basis. As a result of Mr. Galaz's actions, the \$328,000 was diverted from MPAA represented program suppliers. Accordingly, MPAA program suppliers were directly harmed in that amount.

Mr. Galaz's fraud was blatant. He filed the Garfield and Friends claim with the Copyright Office in the name of Tracee Productions. The claims were signed by the fictitious Bill Taylor. After filing the fraudulent claim, Mr. Galaz entered into representation agreements with MPAA using the name Bill Taylor/Tracee Productions. Mr. Galaz signed MPAA Certifications of Entitlement in the name of Bill Taylor/Tracee Productions certifying entitlement to the claimed fund and as a result, received a series of payments totaling \$328,000 for the program.

Apparently emboldened by his successful assertion of a bogus claim, Mr. Galaz next tried to expand his fraud. Prior to the distribution of 1996 cable royalties, Mr. Galaz produced a letter, purportedly signed by Bill Taylor, assigning Tracee Productions' rights to Mr. Galaz. In doing so, Mr. Galaz represented that Tracee claimed funds to hundreds of titles that Mr. Galaz represented "were in Tracee's catalogue." That letter, of course, was a sham. MPAA became suspicious because it recognized the owners of most of the 200 titles asserted to be in the "catalogue" and knew of no connection between those owners and Tracee. When MPAA requested a chain of title to the programming, Mr. Galaz changed the story and asserted that Tracee didn't actually own the titles, that he was claiming them on behalf of other companies by way of the Tracee claim. MPAA advised him that claimants were not permitted, per prior CRT orders,² to amplify claims after filing. Mr. Galaz, an alumnus of one of the nation's best law schools and an experienced entertainment attorney who should have been aware of the order, then responded he was unfamiliar with the ruling and dropped his expanded fraudulent claim.

As detailed in paragraphs 9, 10 and 11 of the Criminal Information, Mr. Galaz filed many more fraudulent claims with the Copyright Office than those for the Garfield and Friends show, for which he received \$328,000. As a part of his Plea Agreement, Mr. Galaz has admitted filing 16 other false or fraudulent claims with the Copyright Office, spanning claim years 1994 through 1997. MPAA has every reason to believe that Mr. Galaz is unrepentant and is behind far more fraudulent royalty claims for the years 1998 to present.

MPAA's experience with Mr. Galaz, in his capacity as the front person for his various organizations, is that he is a first-class dissembler and con-artist. As noted in detail below, for the past 3 years, MPAA has devoted considerable money, time and energy to undoing the harm done by his felonious efforts to subvert the royalty distribution process.

² The Copyright Royalty Tribunal. A now defunct federal agency responsible for allocating retransmission royalties. In effect, the predecessor to CARP.

IV. SUBSEQUENT PROCEEDINGS

In addition to the direct payments indicated above, which were made as a result of Mr. Galaz' filing fraudulent claims for 1994 and 1995 royalties, MPAA has litigated with Mr. Galaz and his front companies, Independent Producers Group ("IPG"), Artist Collection Group and Worldwide Subsidy Group, in Phase II distribution proceedings relating to 1997 cable royalties. Mr. Galaz has admitted filing 16 fraudulent claims for cable and satellite royalties for years subsequent to 1994 and 1995. Some of those fraudulent claims have been the subject of the most recent 1997 Phase II proceeding – hotly contested litigation solely between Mr. Galaz's IPG and MPAA. That litigation has lasted for years and has resulted in two CARP decisions, and the wholesale rejection of both decisions by the Librarian of Congress. See 66 Fed Reg 66433 (Dec. 26, 2001) (copy attached).

One of the main issues litigated in pre-arbitration motions to dismiss and throughout the hearings was IPG's entitlement to claim any royalties – as all of IPG's claims appeared to be, at best, questionable. As a result of Mr. Galaz's actions, including the ardent prosecution of what are now admittedly fraudulent claims, and in order to protect the interests of MPAA represented parties, MPAA was forced to vigorously litigate with IPG to deter IPG's entitlement to share in funds related to the 1997 cable royalties. That litigation caused MPAA to expend over one million dollars in legal, expert witness fees, and other fees to defend against IPG's fraudulent claims.³ As it turns out, and as detailed in the Criminal information filed in this case, Raul Galaz also provided false sworn testimony in that proceeding in addition to submitting fraudulent claims.

During the 1997 Phase II proceeding, Mr. Galaz used every trick in the book to try to substantiate his fraudulent claims. He never let the true facts deter his efforts, and was successful in convincing the Copyright Office and the CARP that powerful Hollywood [MPAA] was being unfair to a poor newcomer who was just trying to learn the ropes. These events caused MPAA to continue to expend its resources to combat Mr. Galaz's criminal activities.

For example, Mr. Galaz asserted claims based on word of mouth, on contracts for the placement of advertising in years other than 1997, on contracts for the sale of video tapes, for local shows (which are not compensable in the Program Supplier category) and for companies who asserted that they had no agreements with him. Using his well-honed tricks, and an understanding of the CARP process, he used data related to works with similar titles to support claims for IPG titles.⁴ Mr. Galaz also lied on the witness stand relative to his case, his business operations and his alias.

³ The breakdown of costs is detailed in Section VI below.

⁴ An example of this was his claim for the movie VICTIM OF LOVE. There are two movies with similar titles:

- VICTIM OF LOVE (1992 w/ Pierce Brosnan and JoBeth Williams)and

In addition, Mr. Galaz presented blatantly erroneous data to support the IPG distribution methodology. Feigning ignorance regarding the correct data, he took note of the actual numbers on the witness stand, thanked MPAA counsel for helping him out and supposedly corrected his calculation. Based on discovery documents, MPAA determined that he had not corrected his calculation. (If he had, the corrected figures would have lowered IPG's already questionable share.) Mr. Galaz asserted on the stand, nonetheless, that he had corrected the numbers but when asked to prove it, replied he did not have the CD containing the data with him. This was simply another Galaz subterfuge.

While on the witness stand, MPAA asked Mr. Galaz if he had ever filed a claim without first obtaining proper authorization. After replying (under oath) that he had not, MPAA produced a letter that Mr. Galaz had written to Hallmark Entertainment advising that he had filed a claim in their behalf, "just in case they had forgotten."

And finally, when asked if he was Bill Taylor (the fictitious president of the fictitious Tracee Productions), Galaz declared boldly, with the Justice Department lawyer and the FBI agent in the room, that he was not. Based on these events and literally scores of other interactions with Mr. Galaz, it is MPAA's experience that the taking of an oath has little, if any, meaning to Mr. Galaz.

The purpose of this section is not to re-hash the pernicious ethic with which Mr. Galaz imbued the distribution proceedings. The objective is to demonstrate the various ways in which he spent the precious commodities of time and money -- close to a full year, not counting the appeal -- and millions of dollars -- obstructing the process of royalty distribution. That obstruction continues to this day. Based on my 20 years' experience in the allocation of royalties, had Mr. Galaz's claims been legitimate, the parties would have settled the case in 10 days or less to everyone's satisfaction.

The decision of the Librarian regarding the 1997 Phase II proceedings is currently on appeal to the United States Court of Appeals for the District of Columbia Circuit. Given the circumstances regarding the admitted false testimony of Mr. Galaz, the only IPG witness in the proceeding below, the admittedly fraudulent claims for 1997 royalties, and other actions of Mr. Galaz, a remand of the appellate proceedings is likely necessary to assess the impact of the Plea Agreement on the appeal. Notwithstanding the likely appellate remand, further motions to reconsider prior orders of the Librarian are also likely. In sum, the effort expended by MPAA in litigation has been wasted and is the direct result of the continual criminal activity and lying of the defendant. In addition to

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- VICTIM OF LOVE: THE SHANNON MOHR STORY (1993 w/Sally Murphy and Dwight Schultz). MPAA claimed the first title (which was broadcast by many stations during 1997) and IPG claimed the second (for which there were no documented broadcasts during 1997). Despite incontrovertible data to the contrary, Mr. Galaz used the broadcast data for the MPAA title to substantiate the IPG claim. He used a similar tactic with a series of infomercials.

MPAA, resources of the Department of Justice, the Federal Judiciary, the Copyright Office and the Librarian of Congress have also been wasted. As part of the sentence imposed by the Court, Mr. Galaz should be ordered to abandon all pending and future claims for royalties, and to reimburse MPAA for all monetary losses and fees and expenses incurred.

V. CLAIMS FOR YEARS AFTER 1997

Claims asserted by IPG for years subsequent to 1997 have not yet been litigated or subject to full scrutiny. However, the information available to date suggests that as in the past, many, if not most, of the claims asserted by Mr. Galaz's entities are fraudulent. For example, a colleague has contacted or attempted to contact many of the dozens of companies for which Mr. Galaz has asserted claims post-1997. While the research has not been finalized, it has revealed that most of Mr. Galaz's so-called clients have disavowed any knowledge of him and have denied having any agreement with him or his companies. In some cases, the colleague was unable to reach the client because the address was bad or the phone number listed by Mr. Galaz was non-existent.

Given these circumstances, all of the claims made by IPG should be withdrawn. To the extent a Galaz-represented claimant can individually establish a properly and timely filed claim in the distribution proceedings, that claimant should be entitled to share in royalty distributions and MPAA will ensure this Court that it will do whatever it can so that any such *bona fide* claimant will not be adversely impacted based on an unfortunate association with Mr. Galaz.

VI. DIRECT HARM CAUSED BY GALAZ

The criminal activity of Mr. Galaz has directly harmed MPAA and MPAA represented companies in the following ways:

A. Lost Resources

As a result of Mr. Galaz obstruction of the royalty process, MPAA and copyright owners have been deprived or expended a substantial sum of money.

1. Royalties associated with the GARFIELD AND FRIENDS
program paid directly to Mr. Galaz via Tracee Productions \$328,000
2. Expense of CARP arbitrators – 1997 cable litigation against
Mr. Galaz.....\$454,000⁵

⁵ The Copyright Office deducts the cost of the CARP arbitrators from the royalty fund prior to distributing the moneys. All costs thus absorbed by the royalty pool represent a loss of royalties to program owners.

3. Payroll & Benefits, MPAA professional and legal staff during the period MPAA litigated against Mr. Galaz relative to '97 cable \$430,000
 4. Outside legal fees associated with 1997 cable litigation against Mr. Galaz..... \$503,000
- Total direct MPAA losses due to criminal activity \$1,715,000⁶**

B. Lost Time

Because I am the principal MPAA employee responsible for the allocation of royalties, time that would ordinarily be devoted to paying claims has been spent defending our companies' claims against those of Mr. Galaz. Not included in the numbers shown above are tens of millions in royalties that were distributed late because MPAA's human resources were concentrated on fighting Mr. Galaz's bogus claims.

VII. CONCLUSION

In my view, Mr. Galaz has a blatant disregard for the law. He is not a victim of unfortunate circumstances who has been led to do wrong. A graduate of two of the best schools in this country, UCLA and Stanford Law School, Mr. Galaz's testimony before the CARP demonstrates that he has had ample opportunities to be an honest and forthright businessman. Mr. Galaz has chosen to use his talents for criminal purposes. One would have thought that, in light of his guilty plea, Mr. Galaz would amend his criminal ways. However, given the existence of additional false claims post-1997 and what MPAA understands to be the continued involvement of IPG in the CARP process, it is my view that Mr. Galaz remains an unrepentant, calculating sham artist who will continue to press fraudulent claims.

As part of the sentence imposed by the court, MPAA requests that the court order Mr. Galaz to pay restitution to MPAA in the amount of \$1,715,000. Additionally, MPAA respectfully requests that this court order Mr. Galaz and his companies IPG, Worldwide Subsidy Group and Artists Collection Group to abandon all pending claims to cable royalties and dismiss all pending actions and appeals seeking to receive Royalty

⁶ There are also substantial funds in escrow that were claimed by Mr. Galaz and his companies and which are awaiting distribution to rightful claimants. Additional GARFIELD royalties in escrow equal \$474,300. Royalties associated with the program BANANAS IN PAJAMAS in escrow at MPAA claimed by Mr. Galaz via his fictitious company Sachs Associates equal \$9,000. Royalties associated with the program BLINKY BILL in escrow at MPAA equal \$4,400, which were claimed by Mr. Galaz via his fictitious company Blink Productions. Royalties associated with '97 Phase 2 litigation in escrow at MPAA pending conclusion of the 1997 royalty distribution case equal \$79,200. Those funds are claimed both by Mr. Galaz and by MPAA represented claimants in 1997 Cable Phase 2 royalty litigation. Finally, the Copyright Office is holding some \$7 million pending the outcome of the '97 Phase 2 case.

Letter to The Honorable Henry H. Kennedy, Jr.
Re: *United States v. Raul C. Galaz*, Criminal No. 02-230
September 16, 2002
Page 8 of 8

Funds for the year 1997. To the extent that proceedings before the Copyright Office establish legitimate claimants within Mr. Galaz's claims for 1997 to the present, MPAA ensures that such claimants will be compensated in accordance with the royalty distribution methodology utilized for all other Program Suppliers.

Respectfully submitted,

A handwritten signature in black ink that reads "Marsha E. Kessler". The script is cursive and fluid.

Marsha E. Kessler
Vice President for Retransmission
Royalty Distribution

Attachment

WDCDOCS 47887v1

Subject Firm	Location	Date received at Governor's Office	Petition No.	Articles Produced
Midland Steel Products (Co.)	Janesville, WI	12/05/2001	NAFTA-5,616	steel.
Electronic Assembly Corp. (Wkrs) ..	Neenak, WI	12/04/2001	NAFTA-5,617	electronic products.
Cherry Automotive (Wkrs)	Pleasant Prairie, WI	11/13/2001	NAFTA-5,618	electronic products.
Graham Tech (Co.)	Cochran, PA	12/07/2001	NAFTA-5,619	gaging.
EM Solutions (Wkrs)	Longmont, CO	12/06/2001	NAFTA-5,620	
Blitwell Clothing—Rector Sportwear (Co.).	Rector, AZ	12/05/2001	NAFTA/05/2001	men's tailored pants and slacks.
Lexmark International (Co.)	Lexington, KY	12/05/2001	NAFTA-5,622	inkjet printers and cartridges.
Protel, Inc. (Wkrs)	Lakeland, FL	12/03/2001	NAFTA-5,623	pay phones.
AVX Corporation (Wkrs)	Vancouver, WA	12/04/2001	NAFTA-5,624	electronic capacitor.
Alcatel USA Marketing	Andover, MA	11/30/2001	NAFTA-5,625	router.
Milwaukee Electric (Wkrs)	Blytheville, AR	12/05/2001	NAFTA-5,626	electric power tools.
Freightliner PMP (Wkrs)	Gastonia, NC	12/04/2001	NAFTA-5,627	trucks and parts.
Cooper Bussman (Wkrs)	Goldsboro, NC	12/05/2001	NAFTA-5,628	fuses & fuseholders.
ASARCO (Co.)	Strawberry Plains, TN	12/05/2001	NAFTA-5,629	zinc.
Meridian Automotive Systems (UAW).	Controlia, IL	11/30/2001	NAFTA-5,630	fixtures, water jets, heat shield molds.
VF Jeanswear Limited Partnership (Wkrs).	Shenandoah, VA	12/05/2001	NAFTA-5,631	men's and women's bluejeans & casualwear.
VF Jeanswear Limited Partnership (Wkrs).	El Paso, TX	12/07/2001	NAFTA-5,632	men's and women's pants.
Evergreen Wholesale Florist (Wkrs)	Seattle, WA	12/10/2001	NAFTA-5,633	florist—flower arrangement.

[FR Doc. 01-31633 Filed 12-26-01; 8:45 am]
BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA-5254]

Fashion Works, Inc. Dallas, TX; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182) concerning transitional adjustment assistance, hereinafter called NAFTA-TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2331), an investigation was initiated on August 23, 2001, in response to a petition filed by the company on behalf of workers at Fashion Works, Inc., Dallas, Texas.

The petitioner requests the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 10th day of December, 2001.

Edward A. Tomchick,
Director, Division of Trade Adjustment Assistance.

[FR Doc. 01-31630 Filed 12-21-01; 8:45 am]
BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA-005302]

Tyco Electronics, TDI Division, Romeoville, Illinois; Notice of Termination

Pursuant to Title V of the North American Free Trade Agreement Implementation Act Pub. L. 103-1 concerning transitional adjustment assistance, hereinafter called NAFTA-TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2331), an investigation was initiated on September 4, 2001, in response to a petition filed on behalf of workers at Tyco Electronics, TDI Division, Romeoville, Illinois. Workers produced battery packs.

An active certification covering the petitioning group of workers remains in effect (NAFTA-004168). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 11th day of December, 2001.

Linda G. Poole,
Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 01-31627 Filed 12-21-01; 8:45 am]
BILLING CODE 4510-30-M

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2000-2 CARP CD 93-97]

Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds

AGENCY: Copyright Office, Library of Congress.

ACTION: Order.

SUMMARY: The Librarian of Congress, upon the recommendation of the Register of Copyrights, announces his rejection of the initial and revised reports of the Copyright Arbitration Royalty Panel ("CARP") in the Phase II proceeding in the syndicated programming category for distribution of the 1997 cable royalty funds, and remands the case for a new proceeding before a new CARP.

EFFECTIVE DATE: December 26, 2001.

ADDRESSES: The full text of the CARP's initial report and revised report to the Librarian of Congress are available for inspection and copying during normal business hours in the Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE, Washington, DC 20559-6000.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney for Compulsory Licenses, Copyright Arbitration Royalty Panel ("CARP"), P.O. Box 70977, Southwest Station, Washington, DC 20024-0400. Telephone (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:

Background

Each year, cable systems in the United States submit royalties to the Copyright Office under a statutory license which allows cable systems to retransmit over-the-air television and radio broadcast signals to their subscribers. 17 U.S.C. 111. These royalties are, in turn, distributed in one of two ways to copyright owners whose works were included in the cable retransmissions of over-the-air television and radio broadcast signals and who timely filed a claim for royalties with the Copyright Office. The copyright owners may either negotiate a settlement agreement amongst themselves as to the distribution of the royalty fees or, if they cannot agree, the Librarian of Congress may convene one or more Copyright Arbitration Royalty Panels ("CARPs") to determine the distribution of the royalty fees which remain in controversy. See 17 U.S.C. chapter 8.

Cable royalty distribution proceedings are conducted by the Librarian under the CARP system in two phases. In a Phase I proceeding, the total cable royalty pool for a given year or years is divided among different categories of copyrighted programming that typically appear on broadcast programming. These categories are movies and syndicated programming, sports programming, devotional or religious programming, musical programming, commercial and noncommercial broadcast programming, and Canadian programming. Once the royalty pool is divided into these categories, the Librarian conducts one or more proceedings at Phase II to resolve disputes within a particular category as to the division of the royalties. Today's royalty distribution determination is a Phase II proceeding in the movie and syndicated programming category (often referred to collectively as the "program supplier" category).

The litigants in this Phase II proceeding in the program supplier category are the Motion Picture Association of America, Inc. ("MPAA"), which represents the majority of copyright owners who filed claims for a distribution of 1997 cable royalties, and the Independent Producers Group ("IPG"), which represents the remaining copyright owners who filed claims for a cable royalty distribution. The Librarian was required to convene a CARP to resolve this Phase II proceeding because MPAA and IPG could not agree as to the division of royalties in the program supplier category.

After a protracted discovery period, the Librarian convened the CARP in this

proceeding on October 17, 2000. As provided by section 802(e) of title 17, United States Code, the CARP had six months to hear the evidentiary presentations and arguments of MPAA and IPG and to render a decision. The CARP delivered its initial report to the Librarian on April 16, 2001, awarding IPG 0.5% of the royalty pool and the remainder to MPAA. After review, the Librarian returned the case to the CARP. By Order dated June 5, 2001, the Librarian dismissed all of the claimants comprising IPG's case except for Litton Syndications, Inc. and directed the CARP to adjust its award to IPG and MPAA to account for the dismissal. In addition, the Librarian directed the CARP to articulate the methodology it was using to assign the new distribution percentages and to detail the application of the methodology to the facts before it. See Order in Docket No. 2000-2 CARP CD 93-97 (June 5, 2001). The Librarian fully explains his reasoning for rejecting the initial determination of the CARP in this Order.

On June 20, 2001, the CARP returned a new determination. It awarded IPG 0.212% of the royalty funds, with the remaining 99.788% to MPAA. The Librarian permitted IPG and MPAA an additional round of petitions to modify the CARP's determination and replies. The Register now makes her recommendation to the Librarian following her review of the CARP's determination.

Part One—Decisions of the CARP

The Initial CARP Report

The 108-page initial report of the CARP has three essential parts. The first part deals with the validity of the royalty claim filed with the Copyright Office in July 1998 under 17 U.S.C. 111(d)(4) that forms the basis for IPG's participation in this proceeding. The second part addresses and ascribes the proper representation of specific television programs as between MPAA and IPG. The third part of the report resolves the division of the royalties in the program supplier category between MPAA and IPG. The Panel awarded MPAA 99.50% of the royalties and 0.50% to IPG.

1. IPG's Claim

The validity of IPG's claim was hotly contested in this proceeding. The first challenge was raised in the precontroversy discovery period when MPAA moved to dismiss IPG's Phase II case on the grounds that IPG's claim (marked as No. 176 by the Copyright Office) did not comply with the Office's rules and regulations. MPAA asserted

that none of the entities listed in exhibit D of IPG's written direct case, which forms the basis of IPG's claim for royalties, appeared on claim No. 176 as required by § 252.2 of the rules. 37 CFR 252.2. According to MPAA, IPG entered into representation agreements with the exhibit D parties after July 31, 1998 (the closing date for filing cable royalty claims with the Office for calendar year 1997), thereby circumventing the requirement of § 252.2 that all claimants to a joint claim be identified on the claim as filed with the Office.

IPG's compliance with § 252.2 was questionable. Stylized as a "joint claim," IPG identified only one claimant—Artists Collection Group ("ACG"). After the Copyright Office questioned the claim in July of 1998, IPG amended the claim to include ACG and Worldwide Subsidy Group ("WSG"). This amendment appeared, on its face, to satisfy the requirements of § 252.2, and the Office did not pursue the matter further. However, when IPG filed a written direct case identifying 16 other parties as claimants, the Library considered MPAA's motion for possible violation of the rule.

In an Order dated June 22, 2000, the Library determined that the prudent course of action was to designate the matter of MPAA's motion to the CARP for further factual findings and final resolution. The Library did this after consideration of IPG's objections to MPAA's motion to dismiss, the language of § 252.2, and the provisions of the Copyright Act related to filing cable royalty claims. The Library rejected IPG's argument that it was acceptable for ACG to file a single claim on behalf of 16 other parties and chastised IPG for not listing the 16 in its joint claim as provided in § 252.2. However, the Library declined to dismiss IPG's case and designated the MPAA motion to the CARP because:

[T]he Library cannot say with certainty that all previous claims filed in cable royalty proceedings have listed all joint claimants. It is sometimes the case that the Copyright Office will receive a single claim filed by a production company that does not identify any joint claimants. Whether this production company owns all or some of the copyrights represented by the claim, or is just a representative of unidentified copyright owners, is unknown to the Office. To the Library's knowledge, these claims have not been challenged in the past, and this is a case of first impression. Consequently, the Library is not inclined without prior warning to strictly enforce the requirement that all owners and distributors be identified in a joint claim. However, what is clear, and what the law requires, is a factual determination as to which of the owners and distributors identified by IPG in exhibit D of its written

direct case were in fact represented by Worldwide Subsidy Group¹ at the close of the filing period for 1997 cable claims. Any party listed in exhibit D (with the exception of Lacey Entertainment, which filed its own claim) that was not represented by Worldwide Subsidy Group before August 1998 cannot be said to have filed a timely claim, and therefore testimony contained in IPG's written direct case regarding such party must be stricken.

Order in Docket No. 2000-2 CARP CD 93-97 at 7 (June 22, 2000). The Library directed the CARP to make factual determinations as to whether there existed written agreements between WSG and each of the exhibit D claimants dated on or before July 31, 1998, the close of the cable royalty claim filing period. IPG submitted, as directed by the Library, copies of the representation agreements between WSG and the exhibit D claimants, along with additional corroborating documents to prove the existence of a representation arrangement on or before July 31, 1998.²

Upon its convocation, the CARP turned to the task of examining the representation agreements and supporting documents to determine which, if any, of IPG's exhibit D claimants would be allowed to remain in the proceeding. The representation agreements are standard form contracts for representation by WSG in collecting (among other things) cable compulsory license royalties. The contract is effective upon the date identified in the lead paragraph of the contract, which provides that "as of (date)," WSG and the identified party have entered into the agreement. With only two exceptions, none of the signature pages in the representation agreements bore a date indicating when the agreement was signed and executed. Some of the additional documents provided by IPG (copies of letters and faxes) provided context to some of the representation agreements to indicate the time period in which they were signed and executed.

In its report, the CARP examined the documents for each of the exhibit D claimants and decided which claimants had a signed agreement with WSG on or before July 31, 1998, and which did not. The CARP determined that a valid representation agreement existed for the following: Abrams/Gentile Entertainment; Raycom Sports; Flying Tomato Films; Funimation Productions;

Golden Films Finance Corporation IV and American Film Investment Corporation II; Litton Syndications, Inc.; Sandra Carter Productions; and The Tide Group d/b/a Psychic Readers Network. The CARP found that while there may have existed a valid representation agreement between WSG and Mendelson/PAWS, WSG's claim of representation was trumped by General Mills, a claimant ascribed to MPAA's claim. The CARP dismissed the United Negro College Fund from IPG's case because it determined that a representation agreement did not exist until sometime in November of 1998, well after the July 31, 1998, deadline.

2. IPG's Programs

As provided in the section 111 cable license, copyrighted works that are retransmitted by cable systems on a distant basis are entitled to royalties collected from cable systems. In the program supplier category, which is the subject of this proceeding, these works are movies and syndicated television programs.

After resolving the matter of which IPG claimants remained in the proceeding, the CARP turned to the task of determining which of the programs claimed by IPG claimants were entitled to a royalty distribution.³ Some programs were claimed by both IPG and MPAA. The following is a summary of the programs that the CARP credited to IPG's claimants.

a. *Abrams/Gentile Entertainment*. The CARP awarded all five programs claimed by IPG—*Dragon Flyz*; *Happy Ness*, *Secret of the Loch*; *Jelly Bean Jungle*; *Sky Dancers*; and *Van Pires*—to IPG. MPAA asserted that *Jelly Bean Jungle* belonged to Audio Visual Copyright Society d/b/a Screenrights, rather than Abrams/Gentile, but the CARP determined that "Audio Visual Copyright Society's own 1997 [program] Certification [did] not list such program in its claim." CARP Report at 53.

b. *Raycom Sports*. The CARP awarded all four programs claimed by IPG—*Elvis*, *His Life and Times*; *Journey of the African American Athlete*; *More Than a Game*; *Our Holiday Memories*—to IPG, finding that the MPAA did not contest any of these titles. CARP Report at 53-54.

c. *Flying Tomato Films*. The CARP did not credit the one program, *Just Imagine*, to Flying Tomato Films, because it determined that Litton

Syndications held the syndication rights to the program. CARP Report at 54-55.

d. *Funimation Productions*. The CARP identified only one program belonging to Funimation Productions: *Dragon Ball Z*. The CARP determined that Fox Family Worldwide, not Funimation Productions, was the proper syndicator for *Dragon Ball Z*, and therefore IPG was not entitled to a distribution for this program. CARP Report at 55-56.

e. *Golden Films Finance Corporation IV and American Film Investment Corporation II*. Two programs were claimed by IPG for these companies: *Enchanted Tales* and *Thumbelina*. The CARP determined that *Enchanted Tales* is a series of videos, one of which is *Thumbelina*, and that the syndication rights to these programs belong to Eyemark Entertainment and Summit Media, not Golden Films and American Films. CARP Report at 58. Further, the CARP determined that both *Enchanted Tales* and *Thumbelina* were not retransmitted by cable systems during 1997. *Id.* Consequently, the CARP did not give credit to IPG for these programs.

f. *Litton Syndications, Inc.* IPG identified thirteen programs belonging to Litton in its written direct case: *Algo's Factory*; *Jack Hanna's Animal Adventures*; *Dramatic Moments in Black Sports History*; *Dream Big*; *Harvey Penick's Golf Lessons*; *Shaka Zulu*; *Story of a People*; *Mom USA*; *Nprint*; *Critter Gitters*; *Sophisticated Gents*; *The Sports Bar*; and *Bloopy's Buddies*. The CARP eliminated *Shaka Zulu* and *Story of a People* from IPG's claim, finding that syndication rights to *Shaka Zulu* were properly held by Harmony Gold USA, not Litton, and that the proper syndicator for *Story of a People* was unknown. CARP Report at 60-61. The CARP also eliminated *Dream Big*, determining that Warner Brothers, not Litton, was the syndicator of that program. *Id.* at 62. Although both IPG and MPAA claimed *Dramatic Moments in Black Sports History*, the CARP determined that Litton was indeed the syndicator and credited IPG's claim with this program. *Id.* The remaining programs were credited to IPG.

g. *Mendelson/PAWS*. The single program claimed by Mendelson/PAWS, *Garfield and Friends*, was claimed by both MPAA and IPG. MPAA supplied documentary evidence from General Mills indicating that it was the syndicator of *Garfield and Friends*, even though Mendelson/PAWS produced the program. The CARP did not credit IPG with *Garfield and Friends*, determining that Mendelson/PAWS resolved the

¹ IPG by this time had informed the Library that ACG had withdrawn its claim and that WSG was the sole claimant remaining for claim No. 176.

² The Library amended its regulations after the June 22, 2000 Order to prevent future confusion as to the filing of single and joint claims. See 66 FR 29700 (June 1, 2001).

³ Because all remaining monies in the 1997 program supplier category automatically belonged to MPAA's claimants once IPG's claim was determined, the CARP focused its attention only on IPG's programs.

dispute by removing its claim. CARP Report at 64–65.

h. *Sandra Carter Productions*. IPG identified five programs belonging to Sandra Carter: *Bottom Line*; *By River, By Rail*; *Flex*; *Parenting in the 90's*; *Til Earth and Heaven Ring*. MPAA asserted that *Parenting in the 90's* belonged to Audio Visual Copyright Society d/b/a/ Screenrights, but the CARP determined that Screenrights did not list that program in their certification to MPAA and credited it to IPG. CARP Report at 66. The CARP determined that *Bottom Line*; *By River, By Rail*; and *Til Earth and Heaven Ring* appeared on television station WBAL-TV, Baltimore, Maryland, and was not subject to a distant retransmission by a cable system. These programs were removed from IPG's claim. *Id.* at 66–67. Finally, the CARP credited *Flex* to IPG.

i. *The Tide Group d/b/a Psychic Readers Network*. IPG claimed several programs for the Tide Group that had multiple titles. The CARP credited IPG with *Alcatraz* as one program, *Kenny Kingston* as one program, and *Psychic Readers* (with its alternate title *Psychic Readers Network*) as one program. CARP Report at 68.

j. *United Negro College Fund*. IPG claimed one program for the United Negro College Fund: *Lou Rawls Parade of Stars*. However, the CARP determined that the United Negro College Fund did not have a valid representation agreement with WSG by July 31, 1998. Consequently, IPG did not receive credit for *Lou Rawls Parade of Stars*. CARP Report at 69–70.

k. *Lacey Entertainment*. Both MPAA and IPG claimed credit for Lacey Entertainment's two programs: *America's Dumbest Criminals* and *Mega Man*. The CARP found that Lacey confirmed that MPAA was its representative for section 111 royalties for *Mega Man* and that Lacey was not the U.S. distributor for *America's Dumbest Criminals*. Consequently, the CARP did not credit IPG with these programs. CARP Report at 71–72.

3. The Distribution Percentages

The third part of the CARP's report, which awards IPG 0.5% of the royalties and MPAA 99.5%, is the most troubling portion. After leveling a number of criticisms at both MPAA's and IPG's proposed distribution methodologies, the CARP failed to articulate the method it settled upon in assigning the 0.5% and 99.5% awards.

Both MPAA and IPG proposed detailed methodologies for determining the royalty awards in this proceeding. MPAA's methodology is based upon viewership analysis of movies and

syndicated television programs retransmitted by cable systems in 1997 on a distant signal basis. The underlying premise of the MPAA formula is that actual viewing of movies and syndicated television programs by cable subscribers is the best way to determine the marketplace value of the programming. The source elements for determining actual viewership are: (1) TVData station logs, which show the programs broadcast by the stations and the date and time of their broadcast, for the 82 television stations used by MPAA in its sample survey; (2) a special study of the same 82 stations for the sweeps period conducted by Nielsen Media Research; (3) program ownership data (i.e. which claimants to the 1997 cable royalties own which programs) as contained in the Cable Data Corporation ("CDC") database; and (4) the weighting factors used by CDC to interpolate viewing for non-sweeps months when data from Nielsen is not available. CARP Report at 81.

The CARP described the details of MPAA's distribution methodology as follows:

MPAA selects 82 of the most heavily carried stations retransmitted as a distant signal by Form 3 system operators. Form 3 systems subscribers comprise the largest group of cable subscribers—89% and their gross receipts represent the largest portion—96.5%—of the 1997 cable royalty fund.

The program schedules of these stations are acquired from TVData. The program information is matched to viewing data provided by Nielsen Media Research ("Nielsen"). In particular, Nielsen provides the number of quarter hour segments (QH) each program aired on the station and the average number of cable subscribers who viewed each program on that station on a distant basis.

For each station in the MPAA sample, Nielsen goes into the diary database of approximately 150,000 homes for each sweep, eliminates diaries in local area of the station (as supplied by MPAA), sums the weights by quarter hour for each diary and generates estimated projections on quarter-hour-by-quarter-hour basis.

MPAA then calculates the household viewing hours (HHVH) for each series and motion picture in the study. Household viewing hours for every program (claimed and unclaimed) is [sic] calculated for each program using the Nielsen data and interpolated audience data for non-sweeps periods.

After reconciling programs with broadcast times, MPAA then calculates the household viewing hours (HHVH) for each series and motion picture in the study using the Nielsen data and interpolated audience data.

The HHVH formula is: $(\Sigma QH/4) \times DCHH = HHVH$. The formula may be stated as follows: Add the total number of QH segments a program is broadcast in a particular time slot on a particular station. The sum is divided by four to get an hourly measure. The result

is multiplied by the average number of distant cable households (DCHH) that actually watched the program on that station during the time period.

CARP Report at 81–82 (footnotes omitted). Applying MPAA's formula to the 1997 data yields, according to MPAA, a determination that programming represented by MPAA received 99.9292% of the total distant viewing—3,474,810,364 viewing hours out of 3,477,272,694 total viewing hours. MPAA therefore asked for 99.9292% of the 1997 cable royalties. MPAA Findings of Fact at 20, ¶ 55.

IPG proposed a different distribution methodology which yields a greater distribution percentage to IPG. Instead of focusing on viewership as the main valuation method, IPG's methodology operates from the premise that it is best to look at the availability of programming offered to subscribers and the benefits received by the cable operators who retransmit that programming. IPG submits that while the decision of a television station to transmit a particular program is driven by a desire for viewership ratings, cable systems are not concerned with viewership of a particular program, but rather are concerned with attracting and holding the greatest number of subscribers by offering multiple programming choices. IPG attempts to place a value on each and every broadcast using the following data: (1) The number of distant cable subscribers capable of receiving the program broadcast during 1997; (2) the distant retransmission royalties generated during 1997 that are attributable to stations broadcasting a particular program; (3) the time placement of the broadcast; and (4) the length of the particular broadcast. CARP Report at 95.

The CARP described IPG's distribution methodology as follows:

IPG expanded MPAA's station sample to 99 television stations, including only those with a combined percentage of distant cable subscribers and "fees gen." (fees generated) significantly greater than the original selection. The added stations were heavily retransmitted according to distant subscribership data for Form 1, Form 2, and Form 3 cable systems.

IPG secured data from TVData reflecting all programs broadcast on the 99 Sample Stations, 24 hours a day, for the entire year of 1997 and segregated programming compensable in the syndicated programming category.

IPG accorded a "Station Weight Factor" to each and every compensable broadcast blending of (i) the average percentage of distant cable subscribers capable of viewing the station of broadcast and (ii) the average percentage of "fees gen." attributable to the station of broadcast, as compared to the other 99 Sample Stations.

IPG then accorded a "Time Period Weight Factor" based on the time period or daypart of the program broadcast, weighted according to data derived from the "1998 Report on Television" published by Nielsen Media Research, and factored in the length of each such broadcast.

CARP Report at 96 (footnotes omitted; parenthetical not in original). Applying IPG's methodology to its data yields, according to IPG, a determination that 0.881% of the aggregate Sum Weighted Value of all programs claimed in this proceeding belongs to IPG. IPG Findings of Fact at 16-17, ¶ 51.

Both MPAA and IPG leveled criticisms at each other's methodologies, and the CARP details those criticisms. See CARP Report at 82-94 (IPG); 97-102 (MPAA). The CARP accepted the following criticisms of MPAA's approach:

- MPAA's direct testimony did not sufficiently lay the foundation for the survey or explain its results.
- The Panel was forced to call its own witnesses, Mr. Lindstrom from Nielsen, and Mr. Larson from Cable Data Corporation to explain their methods of data acquisition and reporting.
- The number of sampled stations [in MPAA's station survey] has declined without adequate explanation.
- Station selection criteria was excluded Form 1 and Form 2 cable systems.
- The number of "zero" viewing hours shows the flaw in attempting to use the Nielsen data as a proxy for the retransmission market especially since Nielsen had 24 hour sampling capability in 1997.
- There are unanswered technical questions regarding relative error rates and mixing diary and meter data.
- The method of interpolation of non-sweep month estimated viewing needs statistical validation.
- There is an overvaluation of WTBS and under-valuation of the other Superstations in the survey.

Id. at 102-103.

The CARP found the following criticisms of IPG's methodology:

- A mathematically sound basis for the creation and application of the station weight factor and time period weight factor should have been presented by a statistician.
- Daypart data was misapplied thus overstating "all other" viewing.
- It doesn't directly address the marketplace value of the works transmitted, a primary criteria.

Id. at 103.

After stating that it was "recogniz[ing] the strengths and weaknesses" of

MPAA's and IPG's approaches, the Panel proceeded to summarily award IPG 0.5% of the 1997 cable fund and the remaining 99.5% to MPAA. The CARP did observe that "certain 'claimants' had not satisfied the criteria for asserting their claims and certain programs were not qualified. The Panel did not award any royalty allocation for such unqualified 'claimants' nor did it award any royalty allocation for unqualified programs." *Id.* at 106.

Standard of Review

Section 802(f) of the Copyright Act directs that, upon the recommendation of the Register of Copyrights, the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." The narrow scope of review has been discussed in great detail in prior decisions which have concluded that the use of the term "arbitrary" in this provision is no different than the "arbitrary" standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A). See 63 FR 49823 (September 18, 1998); 63 FR 25394 (May 8, 1998); 62 FR 55742 (October 28, 1997); 62 FR 6558 (February 12, 1997); 61 FR 55653 (October 28, 1996). Thus, the standard of review adopted by the Librarian is narrow and provides that the Librarian will not reject the determination of a CARP unless its decision falls outside the "zone of reasonableness" that had been used by the courts to review decisions of the Copyright Royalty Tribunal ("CRT"). See *National Cable Television Ass'n. v. Copyright Royalty Tribunal*, 724 F.2d 176, 182 (D.C. Cir. 1983). Moreover, based on a determination by the Register and the Librarian that the Panel's decision is neither arbitrary nor contrary to law, the Librarian will adopt the CARP's determination even if the Register and the Librarian would have reached conclusions different from the conclusions reached by the CARP.

The U.S. Court of Appeals for the District of Columbia Circuit has stated, however, that the Librarian would act arbitrarily if "without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award." See *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (D.C. Cir. 1998).

For this reason, the Panel must provide a detailed rational analysis of its decision, setting forth specific findings of fact and conclusions of law. See *National Cable Television Ass'n. v.*

Copyright Royalty Tribunal, 689 F.2d 1077, 1091 (D.C. Cir. 1992) (requiring CRT to weigh all relevant considerations and set out its conclusions in a form that permits the court to determine whether it has exercised its responsibilities lawfully).

It is then the task of the Register of Copyrights to review the Panel's report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether and in what manner the Librarian should substitute his own determination.

Remand to the CARP

After receiving the CARP's initial determination, the Register of Copyrights recommended, and the Librarian accepted, that the Report be rejected and remanded to the CARP for further consideration. It was apparent from reviewing the Report that the CARP had acted arbitrarily in three instances: (1) The CARP misapprehended the intent of the June 22, 2000, Order designating consideration of the circumstances of IPG's representation agreements with its exhibit D claimants; (2) the CARP awarded programs to an IPG claimant when there was no introduction of evidence as to the value of the program and assigned another program to IPG without adequate explanation of its decision; and (3) the CARP failed to articulate the reasoning it used in arriving at a distribution percentage of 0.5% for IPG and 99.5% for MPAA. See Order, Docket No. 2000-2 CARP CD 93-97 (June 5, 2001).

1. Dismissal of Additional IPG Claimants

As discussed above, the status of IPG's claim No. 176 has been a focal point of this proceeding. MPAA has moved to dismiss IPG's entire claim no less than three times, claiming that claim No. 176 flouts the Copyright Office's rules and the statute, and is a fraud on the Library. The CARP appears to agree with MPAA's contentions, but stops short of dismissing most if not all of IPG's exhibit D claimants, noting that it "is attempting to accommodate the Copyright Office's previously created, one-time exception to the strict enforcement of the Copyright Office's claim filing rules, while aspiring to achieve fairness for all affected claimants." CARP Report at 42.

The Register concludes that the CARP did not follow the direction and intent of the June 22, 2000, Order directing it to consider the status of IPG's representation of the exhibit D

claimants. The rule and intent of that Order are as follows.

Section 111(d)(3) of the Copyright Act states that royalties collected from cable systems under the cable statutory license may only be distributed to copyright owners "who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period." 17 U.S.C. 111(d)(3). This means that it is copyright owners—individuals or entities that own one or more of the exclusive rights granted by section 106 of the Copyright Act—that are entitled to royalty fees, not those who represent them in CARP proceedings. The statute also provides that royalty fees may only be distributed to "claimants" that file a claim with the Copyright Office during the month of July for royalties collected in the previous calendar year. 17 U.S.C. 111(d)(4)(A). Further, the statute states that claims filed with the Copyright Office shall be submitted "in accordance with requirements that the Librarian of Congress shall prescribe by regulation." *Id.*

The Librarian adopted such regulations, which are found at part 252 of 37 CFR. Section 252.3 of the rules prescribes the content of a cable claim, distinguishing between "individual claims" and "joint claims." An "individual claim" involves royalties that are being sought by a single "claimant," whereas a "joint claim" involves two or more "claimants." The requirements for an "individual claim" are "a general statement of the nature of the claimant's copyrighted works and identification of at least one secondary transmission by a cable system of such works establishing a basis for the claim." 37 CFR 252.3(a)(4). "Joint claims" have an additional requirement. If the claim is a "joint claim," there must be "a concise statement of the authorization for the filing of the joint claim, and the name of each claimant to the joint claim." 37 CFR 252.3(a)(3). Additionally, the "joint claim" must have "a general statement of the nature of the joint claimants' copyrighted works and identification of at least one secondary transmission of one of the joint claimants' copyrighted works by a cable system establishing a basis for the joint claim." 37 CFR 252.3(a)(4).⁴

The June 22, 2000, Order recounts the history of § 252.3, and it will not be repeated here. See June 22 Order at 2–5. The importance about § 252.3 in the context of this proceeding is that it uses the word "claimant" in the text, as opposed to the terms "copyright owner" or "holder of one or more of the

exclusive rights granted by section 106 of the Copyright Act." IPG argued to the Library in response to MPAA's initial motion to dismiss its claim that it was acceptable for Artists Collection Group ("ACG") to file an individual claim, even though it represented several copyright owners, because it was the only "claimant" submitting a claim. June 22 Order at 5. If § 252.3 had used the term "copyright owner" instead of "claimant," then this clearly would not be a permissible interpretation of the rule. The Library disagreed with IPG's interpretation of § 252.3, concluding instead that what ACG had filed was in reality a joint claim, because it was representing only a group of copyright owners who would ultimately be entitled, under 17 U.S.C. 111(d)(3), to the royalties. *Id.* at 6. However, ACG did not list the exhibit D claimants it represented on the claim, as required by § 252.3(a)(3) for joint claims, other than to list Worldwide Subsidy Group ("WSG") which, as was revealed in the proceedings before the CARP, was nothing more than an unregistered, fictitious business name for ACG. CARP Report at 35. The Library did not take the harsh step of dismissing IPG's claim for ACG's failure to list the exhibit D claimants on claim No. 176. Instead, the Library made a one-time exception to the requirement by affording IPG the opportunity to prove that ACG/WSG had entered into valid written representation agreements with each of the exhibit D claimants on or before July 31, 1998, the last day for filing claims to 1997 cable royalties. The Library did this because it could not

say with certainty that all previous claims filed in cable royalty proceedings have listed all joint claimants. It is sometimes the case that the Copyright Office will receive a single claim filed by a production company that does not identify any joint claimants. Whether this production company owns all or some of the copyrights represented by the claim, or is just a representative of unidentified copyright owners, is unknown to the Office. To the Library's knowledge, these claims have not been challenged in the past, and this is a case of first impression. Consequently, the Library is not inclined without prior warning to strictly enforce the requirement that all owners and distributors be identified in a joint claim.

June 22 Order at 7.

In designating to the CARP for factual determination the status of ACG/WSG as representatives of the exhibit D claimants, the Library offered some decisional guidelines:

First, because Worldwide Subsidy Group did not list any joint claimants, IPG has the burden of proving that it represented each of the exhibit D parties for distribution of 1997 cable royalties on or before July 31, 1998.

Second, IPG must submit written proof of representation for each exhibit D party. Written proof is required because claim No. 176 does not identify any of the exhibit D parties, and because testimonial evidence alone will not preserve the integrity of the law and the regulations which prohibit adding parties to a joint claim after the fact. Proof must be in the form of written agreements of representation between IPG and each of the exhibit D parties executed on or before July 31, 1998. Finally, if the CARP determines that one or more of the exhibit D parties were not validly represented by Worldwide Subsidy Group for distribution of 1997 cable royalties on or before July 31, 1998, the CARP must strike that portion of IPG's written direct case related to that party or parties.

June 22 Order at 7

After issuance of the June 22 Order, IPG petitioned the Library for reconsideration, asserting that it had written material in addition to the standard form contract entered into between WSG and the exhibit D claimants that clarified that a representational arrangement existed on or before July 31, 1998. The Library clarified that the "June 22 Order's requirement that proof of representation 'must be in the form of written agreements' does not mean that IPG's standard representational agreement form is the only acceptable document that proves timely representation." Order in Docket No. 2002–2 CARP CD 93–97 at 4 (September 22, 2000). The Library allowed IPG to submit additional documentation, but did not permit the introduction of testimonial evidence. IPG submitted the additional documents, which consisted of letters and faxes discussing the representational contracts submitted earlier by IPG, on October 10, 2000 (these documents are hereinafter referred to as the "October 10 documents").

The Library has reviewed the representational contracts and the October 10 documents for all sixteen of the exhibit D claimants. Several things are evident from this examination. First, with the exception of two of the contracts, they do not contain any dates of execution of the signature page.⁵ Rather, the contract bears a provision, in the lead paragraph, that it is effective "as of" a certain date. In all instances this date is on or before July 31, 1998. Second, it is apparent from the October 10 documents that the "as of" date in the contract is not the date of execution

⁵ The contract with Jay Ward Productions was dated "11/02/99." IPG, however, voluntarily withdrew Jay Ward Productions from its case. Likewise, Mainframe Entertainment's contract was dated October 8, 1998, and IPG also withdrew Mainframe from its case.

⁴ See footnote 2, *supra*.

of the contract. Rather, it was the practice of WSG to send a copy of its contract to a potential client during negotiations for representation and type in the "as of" date at that time. The contract may not have been signed and executed for weeks, or even months, after the "as of" date. Third, there are not October 10 documents for all of the exhibit D parties. For some, the only document evidencing representation is the contract itself bearing the "as of" date.

In each instance, with the exception of the United Negro College Fund, the CARP accepted the "as of" date on the representational contracts as evidence that a representational agreement existed on that date. The Register determines that that decision is arbitrary because it runs contrary to the evidence presented to the CARP. The Register also determines that the Panel's decision on this point countervails the June 22 Order. Pursuant to the terms of that Order, the burden was squarely on IPG to demonstrate through documentary evidence that a valid representational arrangement existed on or before July 31, 1998. The "as of" date is not evidence of such an arrangement, because it is clear from the October 10 documents that the contracts were signed sometime after the "as of" date. In those circumstances where there is documentary evidence that the contract was signed on or before July 31, 1998, IPG has met its burden of proving a representational arrangement.

For Raycom Sports, Abrams/Gentile Entertainment, Funimation Productions, and Sandra Carter Productions, the only documents supplied by IPG are the representational contracts. Because the "as of" dates on these contracts do not prove the dates of their execution, it cannot be determined whether they were signed, and a valid representational arrangement existed, on or before July 31, 1998. Consequently, these parties are dismissed from this proceeding.

There are October 10 documents for The Tide Group d/b/a Psychic Readers Network, but they do not prove that the representational contract had been signed or that a valid representational arrangement had been reached on or before July 31, 1998. Consequently, this party is dismissed.

The CARP dismissed the United Negro College Fund because the October 10 documents suggested that the representational contract was not signed on or before July 31, 1998. The contract bears no date on the signature page, and an "as of" date of July 30, 1998, is handwritten in the first paragraph. There are October 10 documents

discussing entering into a representational agreement in November of 1998, which led the CARP to conclude that a representational arrangement did not exist as of July 30, 1998. IPG has not met its burden of demonstrating that a representational arrangement existed on or before July 31, 1998. Consequently, the Register accepts the CARP's determination to dismiss the United Negro College Fund.

The only exhibit D party for which IPG has met its burden is Litton Syndications.⁶ While there is no date of execution on the Litton/WSG contract, there is a June 16, 1998, letter from Peter Sniderman of Litton to Raul Galaz of WSG stating that "enclosed are four copies of the executed Litton Syndications, Inc.—Worldwide Subsidy Group agreement." In addition, there is a June 18, 1998, letter from Galaz to Sniderman stating that "enclosed herein please find two (2) fully executed originals of the above-referenced agreement." It is clear from these documents that a valid representational arrangement existed between Litton and WSG prior to July 31, 1998. IPG has therefore met its burden as provided in the June 22 Order.

2. The Status of ACG, WSG and IPG

After the extended discussion and analysis of claim No. 176 in the June 22 Order and above, one might believe that the validity of claim No. 176 is definitively resolved. This is not so, because of issues surrounding the names—ACG and WSG—that appeared on the claim. The Library must therefore resolve whether claim No. 176 was a deliberately perpetrated fraud on the Copyright Office and the section 111 filing system.

The CARP Report devotes a considerable amount of discussion to the identity and status of ACG, WSG, and IPG. It is a complicated discussion. When claim No. 176 was originally filed with the Copyright Office on July 11, 1998, it listed ACG as the sole claimant. ACG was incorporated in May of 1998 in the state of California by Raul Galaz, its principal, for the apparent purpose of

representing claimants before the Library for cable and satellite television royalties. Although ACG was the only claimant on claim No. 176, the claim stated that it was a joint claim being filed on behalf of ACG and "on behalf of others." Claim No. 176. Mr. Galaz signed the claim. When Mr. Galaz was informed by the Copyright Office that in order for claim No. 176 to be a joint claim it must identify at least one other claimant, he amended claim No. 176 to include WSG. At that time, WSG was nothing more than an unregistered, fictitious business name for ACG. The following year, Mr. Galaz moved from California to Texas, whereupon he filed articles of incorporation for WSG in Texas. Before leaving California, Mr. Galaz also registered the name WSG in California as a fictitious business name for WSG.

Once in Texas, Mr. Galaz took steps in 2000 to dissolve ACG by filing articles of dissolution in California for ACG. This left WSG as a Texas corporation. Mr. Galaz then adopted an unregistered, fictitious business name for WSG in Texas: IPG. When MPAA moved to dismiss claim No. 176 in June of 2000, IPG informed the Library in a footnote of its opposition to the motion that ACG had voluntarily withdrawn its claim from the proceeding, leaving WSG Texas/IPG as the sole claimant in this proceeding.

The first question is whether these various changes in identity were an attempt to perpetrate a fraud on the Copyright Office by hiding from the Office the real claimants in this proceeding. In other words, did IPG deliberately refrain from listing its exhibit D claimants in claim No. 176 (Litton, Flying Tomato Films, et al.) because it was hiding something from the Office? Assuming that listing only ACG and WSG (California) on claim No. 176 was not an honest mistake, as IPG vigorously claims that it was, the only reason the Library can divine for not listing the exhibit D claimants was that ACG/WSG did not then represent some or all of those claimants or, in the alternative, ACG/WSG did not want to preclude the possibility of signing up additional claimants after the July 31, 1998, deadline.

Whether or not this was ACG/WSG's true motivation is unknown, although the CARP at least suggests a sinister element in Mr. Galaz's actions. CARP Report at 42. In any event, the Register believes that the Library has satisfactorily dealt with the status of IPG's representation of the exhibit D claimants in the June 22, 2000, Order and the above discussion. It is apparent that WSG—i.e., Mr. Galaz—had a valid

⁶ The remainder of the exhibit D parties have been either withdrawn from the proceeding, or their programs have been credited to another. The programs of Beacon Communications Corp., Cosgrove-Meurer Productions, Jay Ward Productions, Mainframe Entertainment, and Scholastic Entertainment were withdrawn by IPG. Flying Tomato Films' program was credited to Litton. CARP Report at 55. Mendelson/PAWS, Inc.'s programs were credited to MPAA. *Id.* at 64. The CARP determined that Golden Films Finance Corporation IV and American Film Corporation II were not entitled to a distribution because their programs were not retransmitted by a cable system on a distant basis. *Id.* at 58. Lacey Entertainment's programs were credited to MPAA. *Id.* at 71-72.

representation arrangement with Litton Syndications in July of 1998 before the close of the cable claim filing period. The Library need not make any determination as to whether Litton's agreement was with ACG/WSG California, WSG Texas, or IPG. Any attempt to do so would necessarily involve questions of state law with respect to the effect of incorporation of a company and use of fictitious business names. Such determinations are beyond the jurisdiction of the Library and are unnecessary in this proceeding. Mr. Galaz/WSG had a valid representation agreement with Litton in July of 1998, and Litton affirms this relationship by allowing IPG to represent it in this proceeding. Because the Library has agreed—this one time⁷—that it was acceptable that Litton did not appear on claim No. 176, *supra*, Litton has a valid claim in this proceeding.

The second question surrounds ACG's voluntary withdrawal from this proceeding. MPAA contends that when ACG withdrew its claim that left only WSG California on claim No. 176, and WSG California was nothing more than a fictitious business name for ACG. MPAA Petition to Modify CARP Report at 33. Litton's representation agreement is with WSG Texas, which is not a claimant in this proceeding, and therefore claim No. 176 must be dismissed. IPG responds that it was counsel's mistake to inform the Library that ACG had withdrawn its claim and that such mistake should be discounted because it appeared in a footnote to an opposition to MPAA's motion to dismiss. IPG Reply to MPAA Petition to Modify CARP Report at 27–29.

Once again, the legal status of ACG, WSG California, WSG Texas, and IPG involve questions of state law beyond the jurisdiction of the Library. While it is true that IPG did state that the claims of ACG were withdrawn, it is illogical to assume that IPG was effectively ending its case by rendering claim No. 176 void. Rather, it is apparent that IPG believed that it held all rights of ACG when it sought to dissolve ACG in California, particularly since Mr. Galaz was the principal for both organizations. It would work a serious injustice to deny Litton royalties based upon a determination that Mr. Galaz made a technical error in assuming that all rights of ACG were held by IPG before ACG withdrew from the proceeding. Indeed, while IPG stated that it was withdrawing ACG's claim, the Library did not enter any order to that effect, leaving the status of ACG in this proceeding unresolved. Certainly, the

actions of Mr. Galaz are not to be condoned and should serve as a warning to future claimants to make sure that proper transfers of rights between corporations are effected prior to seeking dismissal or dissolution of a claimant. However, the Library has determined that a valid representation arrangement existed for Litton and that, in this instance, it is appropriate that Litton's claim be allowed to go forward.

Finally, there is the question of the programs listed on claim No. 176. Section 252.3(d)(4) requires that for joint claims there must be an "identification of at least one secondary transmission of one of the joint claimants' copyrighted works by a cable system establishing a basis for the joint claim." 37 CFR 252.3(a)(4). ACG listed two programs on claim No. 176, *Unsolved Mysteries* and *Garfield and Friends*, neither of which was ultimately credited to IPG. *Unsolved Mysteries* was dropped from IPG's case because it was determined that it was a network program not eligible for section 111 cable royalties. Both IPG and MPAA claimed *Garfield and Friends*, and the CARP ultimately determined that it was properly credited to MPAA. This means that ACG did not identify a secondary transmission on claim No. 176 that belonged to one or more of its joint claimants.

The purpose of requiring identification of at least one secondary transmission by a cable system is to permit the Copyright Office to determine if the claim is facially valid. In other words, if a claimant lists a network program, or a program that was not retransmitted in the calendar year for which royalties are sought, the Office can take immediate action either to request further information, or to dismiss the claim. The Office has contemplated amending its rules to require claimants to identify all the programs that comprise their claim, but is aware that there is considerable opposition among copyright claimants to adopting such a requirement. If the program listed on a claim appears facially valid, the Office does not attempt to resolve its ownership status and the claim is allowed to go forward. In this case, it is apparent that IPG had a colorable claim to *Garfield and Friends*, believing that it had a valid representation agreement with Mendelson/PAWS, the producer of the *Garfield* programs. The CARP determined, however, that MPAA had a stronger claim, ruling that General Mills held the syndication rights to the programs. Consequently, this is not a

case where IPG had no realistic claim to *Garfield and Friends*.⁸

Given the dispute over ownership rights of *Garfield and Friends*, the Register determines that it would be unjust to invalidate all of the claims covered by claim No. 176 because it was ultimately determined that MPAA held the superior claim to the program. Were we to rule the other way, it would make § 252.3(a)(4) a trap for unwary joint claimants. Since the rule requires identification of only one secondary transmission, hundreds of joint claims could potentially be invalidated if a single program is identified that, after litigation before a CARP, is determined to have a superior claimant. There is also the question of what might happen if the joint claimant with the single identified program withdraws its claim or changes representation in the proceeding. Such gamesmanship could potentially wipe out many otherwise valid claims from the proceeding. Because IPG had a colorable claim to *Garfield and Friends* at the start of this proceeding, it would be unjust to invalidate claim No. 176 because the program was ultimately awarded to MPAA.

In sum, the Register concludes that claim No. 176 is sufficiently valid to allow the claim of Litton, as described below, to go forward in this proceeding and receive a distribution of royalties.

3. Programs Credited to Litton

During proceedings before the CARP, IPG claimed thirteen programs for Litton: *Algo's Factory*; *Jack Hanna's Animal Adventures*; *Dramatic Moments in Black Sports History*; *Dream Big*; *Harvey Penick's Private Golf Lessons*; *MomUSA*; *Nprint*; *Critter Gitters*; *Shaka Zulu*; *Sophisticated Gents*; *The Sports Bar*; *Bloopy's Buddies* and *Story of a People*. The CARP did not credit IPG with *Shaka Zulu*, finding that the program properly belonged to Harmony Gold USA, and determined that *Story of a People* was an unclaimed program. The CARP also did not credit IPG with *Dream Big*, determining that it was properly claimed by Warner Bros. as the syndicator of the program. The remaining programs were credited to IPG.

In its petition to modify the initial decision of the CARP, MPAA challenges

⁸ The same cannot be said for *Unsolved Mysteries*. *Unsolved Mysteries* is a network program which can never be eligible for section 111 royalties. See 17 U.S.C. 111(d)(3)(A) (only nonnetwork programs are eligible for distributions). ACG should have known that *Unsolved Mysteries* failed to satisfy the requirements of 37 CFR 252.3(a)(4). If this had been the only program that ACG listed in claim No. 176, there would be solid grounds for dismissal of the claim.

⁷ See footnote 2, *supra*.

the CARP's determination to credit Litton with *Dramatic Moments in Black Sports History*, *Critter Gitters*, and *Bloopy's Buddies*. The CARP credited *Critter Gitters* and *Bloopy's Buddies* to Litton because these programs appeared on Litton's representation agreement with WSG. CARP Report at 59. Both MPAA and IPG claimed *Dramatic Moments in Black Sports History*. After allowing evidentiary supplements to IPG's and MPAA's claim on this program, the CARP stated that "[i]n view of the entire supplemented record, therefore, the CARP finds that *Dramatic Moments in Black Sports History* is represented under the IPG rather than the MPAA claim." *Id.* at 61-62.

With respect to *Critter Gitters* and *Bloopy's Buddies*, MPAA asserts that "IPG made no claim for either program" and "presented no evidence of their value." MPAA Petition to Modify CARP Report at 44. Further, MPAA asserts that the CARP "cites no evidence that either program was broadcast in the United States." *Id.* With respect to *Dramatic Moments in Black Sports History*, MPAA argues that:

The program is listed in MPAA's list of claimed programs. The claimant—New Line Cinema Corporation—appears on MPAA's list of claimants. It appears on the alpha list as owned by New Line Cinema. New Line has certified its entitlement to royalties for *Dramatic Moments in Black Sports History*. The record, therefore, only will support a conclusion that MPAA represents New Line. *Id.* at 43-44 (footnotes omitted).

In response to MPAA's challenge of *Critter Gitters* and *Bloopy's Buddies*, IPG acknowledges that it made no claim in these programs and did not present any evidence of their value "because both programs appear to have been broadcast exclusively on non-commercial television stations." IPG Reply to MPAA Petition to Modify CARP Report at 34. IPG "does not challenge modification of the Panel Report to reflect that such programs were not claimed by IPG." *Id.* IPG does assert, however, that there was evidence supporting its claim to *Dramatic Moments in Black Sports History*, stating that the program is "expressly identified in the contract between Litton and WSG" and was therefore properly credited to IPG. *Id.*

It is apparent that the CARP acted arbitrarily in crediting IPG with *Critter Gitters* and *Bloopy's Buddies*, and the Register recommends rejecting this determination and removing the programs from Litton's list. With respect to *Dramatic Moments in Black Sports History*, the CARP offered no reasons or explanation as to why it was awarding the program to IPG rather than MPAA, other than to state that such result was

obtained "[i]n view of the entire supplemented record." CARP Report at 61-62. Unexplained decisionmaking is the hallmark of arbitrary action. The Register therefore recommends rejection of the CARP's award of *Dramatic Moments in Black Sports History* to IPG. The June 5, 2001, Order directed the CARP to explain its reasoning for awarding *Dramatic Moments in Black Sports History* to IPG.

In sum, the June 5, 2001, Order directed the Panel to credit the following programs to Litton: *Algo's Factory*; *Jack Hanna's Animal Adventures*; *Harvey Penick's Private Golf Lessons*; *Mom USA*; *Nprint*; *Sophisticated Gents*; *The Sports Bar*; and *Just Imagine*.⁹ The Order also directed the CARP to explain its reasons for crediting *Dramatic Moments in Black Sports History* to IPG and, if it continued to believe that it made the correct determination, to credit IPG with that program.

4. The Royalty Awards

The CARP awarded IPG 0.5% of the program supplier category funds, and the remaining 99.5% to MPAA. The CARP, however, failed to explain its reasoning or its methodology for bestowing these awards. Because unexplained decisionmaking by a CARP is arbitrary, the CARP's awards must be rejected. The June 5, 2001, Order remanded the matter to the CARP to determine new awards for IPG and MPAA, in light of the decision announced in that Order to dismiss additional IPG claimants and programs, and to explain the reasoning for the new awards.

The CARP's failure to articulate any reasons for the 0.5% and 99.5% awards, and the methodology it used to produce these numbers, is puzzling. The CARP began its analysis in an appropriate fashion, fully detailing in its report the distribution methodologies proposed by IPG and MPAA. As discussed above, IPG's and MPAA's methodologies were premised on fundamentally different principles. MPAA addressed the marketplace value of the programs it represented by attempting to evaluate the amount of viewership they received, while IPG examined the value of the programs to cable operators who retransmitted them. IPG's methodology accorded the programs it represented a higher award—0.881%—than if the MPAA's methodology were applied to the same programs—0.0708%. The

⁹ The CARP determined that *Just Imagine* was properly credited to Litton, and not to Flying Tomato Films. Both of these parties are represented by IPG. No challenge to the CARP's determination on this matter was made.

CARP then analyzed each side's criticisms of the other's methodology and concluded that a number of the criticisms were valid. It found the following shortcomings for MPAA's methodology:

- MPAA's direct testimony did not sufficiently lay the foundation for the survey or explain its results.
- The Panel was forced to call its own witnesses, Mr. Lindstrom from Nielsen, and Mr. Larson from Cable Data Corporation to explain their methods of data acquisition and reporting.
- The number of sampled stations [in MPAA's station survey] has declined without adequate explanation.
- Station selection criteria excluded Form 1 and Form 2 cable systems.
- The number of "zero" viewing hours shows the flaw in attempting to use the Nielsen data as a proxy for the retransmission market especially since Nielsen had 24 hour sampling capability in 1997.
- The method of interpolation of non-sweep month estimated viewing needs statistical validation.
- There is an overvaluation of WTBS and under-valuation of the other Superstations in the survey.

CARP Report at 102-103. For IPG, the CARP found the following criticisms:

- A mathematically sound basis for the creation and application of the station weight factor and time period weight factor should have been presented by a statistician.
 - Daypart data was misapplied thus overstating "all other" viewing.
 - It doesn't directly address the marketplace value of the works transmitted, a primary criteria.
- Id.* at 103. The Register has reviewed the record evidence in this proceeding and finds that there is ample support for these criticisms. They are not arbitrary. What is arbitrary, however, is what the CARP did next. Rather than address these criticisms in the context of its decision making process, the CARP immediately awarded the 0.5 and 99.5 percentages without any explanation as to how they arrived at these numbers. Since no reasoning was provided for these numbers, they must be rejected. *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (D.C. Cir. 1998) (royalty distribution award arbitrary if rendered without explanation). The June 5, 2001, Order directed the CARP to provide a full explanation of the approach it was using in adopting new distribution awards.¹⁰

¹⁰ In explaining their final numbers, CARPs have flexibility in the methodologies or approaches they

The Revised CARP Report

On June 20, 2001, the CARP delivered its revised report. The revised report assigns new distribution percentages to IPG and MPAA and explains the CARP's reasoning for both its initial awards and the revised awards.

As directed by the June 5, 2001 Order, the CARP only credited IPG with programs belonging to Litton Syndications. The programs are: *Algo's Factory*, *Jack Hanna's Animal Adventures*, *Harvey Pennick's Private Golf Lessons*, *MomUSA*, *Nprint*, *Sophisticated Gents*, *The Sports Bar* and *Just Imagine*. The CARP did not credit IPG with *Dramatic Moments in Black Sports History*, reversing its earlier determination that Litton was the syndicator of the program. See Initial report at 62; Revised report at 2. The CARP determined that "[a]lthough both parties claim this program, New Line Cinema's program certification with MPAA indicates that it claims the program as syndicator." Revised report at 2.

With respect to awards, the CARP modified its initial determination by reducing IPG's award from 0.5% to 0.212%, and increasing MPAA's award from 99.5% to 99.788%. The CARP then explained how it determined the initial 0.5% and 99.5% awards, and then modified them in light of the June 5, 2001, Order to produce the new percentages.

Although the CARP was presented with disparate methodologies for calculating the royalty awards—MPAA's methodology based on Nielsen household viewing hours and IPG's methodology based on value of the programming to cable operators—the CARP did find two elements of these competing methodologies in common. MPAA based its methodology upon a database obtained from CDC that contained 82 commercial television broadcast stations that were

retransmitted by large (Form 3) cable systems on a distant basis during 1997. IPG based its methodology upon a CDC database that contained 99 commercial television broadcast stations (which included the same 82 stations used by MPAA) that were retransmitted by small, medium, and large (Form 1, 2, and 3) cable systems on a distant basis during 1997. Both of these databases have two overlapping categories: "Rebroadcasts," the number of times a particular program was retransmitted; and "Airtime," the length of the program multiplied by the number of times it was rebroadcast. The CARP stated that the purpose of examining the two databases was two-fold: "First to verify the accuracy of the numbers presented in the testimony and exhibits; and secondly to give the CARP a sense of the relative positions of MPAA and IPG represented claimants in the 1997 marketplace by comparing the only two categories included in both databases, Rebroadcasts and Airtime." Revised report at 18.

Appendix A of the revised CARP report compares the Rebroadcasts of the eight programs credited to Litton (as directed by the June 5, 2001 Order) for both the IPG and MPAA databases. For the IPG database, these programs accounted for 0.4394782365% of the total number of program titles Rebroadcast in 1997. For the MPAA database, the eight programs account for 0.2811997603% of the total number of program titles Rebroadcast in 1997.

Appendix B of the revised CARP report compares the Airtime of the eight programs credited to Litton for both the IPG and MPAA databases. For the IPG database, these programs accounted for 0.3494840195% of total Airtime of all programs retransmitted in 1997. For the MPAA database, the programs accounted for 0.2171099164% of the total Airtime of all programs retransmitted in 1997.

The numbers described in Appendices A and B provide a range of comparison as to the amount of time that Litton's eight programs were available on distant broadcast signals retransmitted by cable systems. But this range did not account for how much these programs were watched, or the value ascribed to these programs by cable operators. To account for this, the CARP turned to MPAA's and IPG's methodologies and applied its criticisms of the evidence presented for each methodology, assessing penalties (percentage deductions from the total award yielded by the methodology) for each criticism depending upon the severity of the criticism. The eight criticisms of MPAA's methodology and

the three criticisms of IPG's methodology, and their accompanying deductions, are described in Appendix D of the CARP's revised report. As a result of the eight criticisms, MPAA suffered a 0.450% reduction in the awards yielded by its methodology, and IPG suffered a 0.375% reduction in the awards yielded by its methodology.

As with its comparison of IPG and MPAA databases, the revised IPG and MPAA methodologies (i.e. after the penalty reductions) yielded yet another range of numbers. For IPG, the revised MPAA methodology gave it an award of 0.462% of the 1997 royalty funds, while revision of its own methodology yielded an award of 0.731%. See Appendix D. According to the CARP, it is this range of numbers that yielded the 0.5% award to IPG in the initial report. Revised report at 18.

Because the June 5, 2001, Order eliminated programs credited to IPG under both MPAA's and IPG's methodologies, the CARP needed a way to adjust downward IPG's award, and increase MPAA's award, to reflect the eliminated programs. It did this by examining the reduction in the percentages of Rebroadcasts and Airtime credited to IPG for its original claim and derived a median change of minus 57.673%. Appendix C. The minus 57.673% figure represents the median change from the original amount of Rebroadcasts and Airtime credited to IPG. According to the CARP,

"[e]liminating all claimants except Litton, means that on average, IPG now represents only 42.322% of the Rebroadcasts and Airtime that they did before." Revised report at 20. This meant that "IPG is entitled to 42.322% of the Original Award" of 0.5%. *Id.* Consequently, the CARP awarded IPG 0.212% of the 1997 royalty funds in the syndicated program category, and the remaining 99.788% to MPAA.

Petitions to Modify the CARP's Revised Report

Both MPAA and IPG level a number of criticisms at the conclusions reached by the CARP in the revised report, all of which they charge rise to the level of arbitrary action as a matter of law. MPAA submits that the CARP's award of 0.212 of one percent of the royalty funds to IPG is excessive and must be reduced. IPG counters that the methodology used by the CARP is fundamentally flawed and that its award must be increased.

MPAA charges that the CARP made mathematical, methodological, and evidentiary errors in both the initial and revised reports. The principal mathematical error, according to MPAA,

use. The courts have recognized that there is a considerable "zone of reasonableness" when awarding a particular distribution percentage. See, e.g. *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 182 (D.C. Cir. 1983). In other words, there are no magical formulas that produce precise results. In this proceeding, the CARP could have chosen either IPG's or MPAA's formulas, adjusted the chosen formula to account for the CARP's criticisms of it, and used that process to yield the final numbers. Or, the CARP could have chosen a combination of both formulas, taking into account the criticisms of both, to arrive at the final numbers. Or, the CARP could have adopted its own distribution methodology or formula, using the data in the record of the proceeding to achieve the final results. Each of these approaches is acceptable provided that the CARP articulates the reasons for its choice, explains how it applied its choice to produce its final determination, and the determination itself is reasonable.

concerns the CARP's use of IPG's requested royalty distribution percentage of 0.881. In appendix D to the revised report, the CARP used the 0.881% distribution percentage offered by IPG and adjusted it downward by 0.375% to reflect its three criticisms of IPG's evidentiary presentation. MPAA states that 0.881% is the wrong starting percentage because it reflects all the programs originally claimed by IPG and does not take into account the programs that the CARP eliminated from IPG's claim. Using IPG's valuations for each of its claimed programs, MPAA asserts that the CARP should have adjusted the 0.881% claim of IPG downward to 0.332%, since only 37.68% of the programs originally claimed by IPG were credited by the CARP in its initial report. MPAA Petition to Modify Revised Report at 5. Deducting 0.375% for the three criticisms of IPG's evidentiary presentation from 0.332% yields a negative distribution percentage for IPG.

MPAA challenges the methodology employed by the CARP; in particular the use of Rebroadcasts and Airtime for IPG's and MPAA's represented programming. MPAA asserts that this approach unduly relies upon time considerations (i.e. time on the air) and ignores the marketplace value of the programming in contravention of prior CARP precedent. CARP Report in Docket No. 94-3 CARP CD 90-92 at 19-20 (June 3, 1996). These considerations aside, MPAA also questions the usefulness of comparing Rebroadcasts and Airtime from both MPAA's and IPG's sample surveys, since MPAA's 82 station sample survey contains more rebroadcasts and more hours of airtime than IPG's 99 station survey. The inherent illogic of this result should have, according to MPAA, indicated to the CARP that reliance solely on these numbers is flawed.¹¹

MPAA also makes numerous challenges to the CARP's treatment of the evidence presented in this proceeding. In particular, MPAA asserts that the CARP's five criticisms of various aspects of MPAA's evidentiary presentation, that resulted in a 0.450% upward adjustment to IPG's share of the royalties as identified by MPAA, are baseless. First, MPAA argues that the 82 station sample survey it put forth was

statistically sound since it "very nearly reflects the entire universe of distant signal carriage, accounting for 92.5 per cent of aggregate subscribers instances. Therefore, the possibility of a margin for error that is in any way significant is nil." MPAA Petition to Modify Revised Report at 12.

Second, MPAA argues that there is no record evidence that demonstrates that exclusion of Form 1 and Form 2 cable systems from the total instances of distant cable carriage of syndicated programming negatively impacts the results of its 82 station sample survey, since the Form 3 cable systems used in the survey account for 89% of all cable subscribers to distant broadcast stations. Third, MPAA argues that the CARP had no grounds to criticize the number of zero viewing instances reported in the Nielsen household viewing hours used in the MPAA survey, especially since Paul Lindstrom, the only qualified expert in economics and statistics testifying in the proceeding, asserted that they did not have a significant bearing on the statistical validity of the survey.

Fourth, MPAA charges that it was inappropriate and unfair for the CARP to criticize MPAA for not presenting relative error figures with respect to its methodology components and for mixing Nielsen diary data with Nielsen meter data. Finally, MPAA charges that it was groundless for the CARP to penalize MPAA 0.10% for its interpolation of data for time periods not measured by Nielsen (i.e. non sweeps periods) and only accord IPG a 0.075% penalty for a similar criticism.

IPG also asserts that the CARP made a series of errors in fashioning both the original awards and the revised awards. IPG asserts that the CARP erroneously assigned two programs—*Dream Big* and *Dramatic Moments in Black Sports History*—to MPAA. *Dream Big* was credited to MPAA in the CARP's original report because it identified Warner Bros. as the syndicator of the program. With respect to *Dramatic Moments in Black Sports History*, the CARP originally assigned it to IPG (as claimed by Litton) but was directed by the Librarian's June 5, 2001, Order to provide an explanation for this decision. In the revised report, the CARP changed its mind and assigned *Dramatic Moments in Black Sports History* to MPAA because it concluded that New Line Cinema was the syndicator of the program, not Litton. IPG submits that if the Librarian does not restore these two programs to Litton's claim, then he should "place the funds for the[se] program[s] * * * in escrow until the

proper recipient is determined." IPG Petition to Modify Revised Report at 4.

Like MPAA, IPG criticizes the CARP's reliance upon the number of Rebroadcasts and Airtime in fashioning its awards, noting that undue reliance on time considerations is contrary to precedent of the CRT and is not reflective of the value of the programming. IPG states that it provided the CARP with the unit value for each of its claimed programs (utilizing IPG's methodology), thereby giving the CARP the opportunity to derive an award based on the programs it credited to IPG. The eight programs credited to Litton amount to 79.074% of the original award to IPG of 0.5%, meaning that the CARP should have adjusted the original 0.5% award downward to 0.3958%. Such an award would, according to IPG, reflect the true value of the Litton programs.

With respect to the CARP's criticisms of MPAA's methodology, IPG argues that the CARP did not go far enough. IPG asserts that the CARP never verified the number of household viewing hours attributed to MPAA in its study, noting that MPAA received credit for appreciable numbers of programs not claimed by MPAA or certified by its members. Further, IPG asserts that the CARP should have penalized MPAA for having to call Paul Lindstrom and Thomas Larson as witnesses to provide additional support for MPAA's methodology. And IPG submits that the CARP should have penalized MPAA more than it did for reducing the number of stations in its station sample survey and for the large amount of zero viewing instances of programming contained in the Nielsen data presented by MPAA.

Finally, IPG asserts that certain of the CARP's criticisms of IPG's methodology are not valid. With respect to the CARP's critique that IPG misapplied its daypart data thereby overstating its weighted viewing factor, IPG asserts that no evidence was presented to demonstrate that such misapplication provided any benefit to IPG. And, with respect to the CARP's criticism that IPG's methodology attempted to demonstrate the overall appeal of broadcast stations to cable operators, as opposed to the overall appeal of the programming to cable operators, IPG argues that the CARP simply mischaracterized its summary reference of "overall station appeal" by ignoring the elements that comprised this aspect of IPG's methodology.

Rejection of the Revised Report

The Register makes her recommendation as to whether the

¹¹ IPG counters this argument by noting that MPAA's 82 station data includes all broadcasts, irrespective of whether the program falls in the syndicated programming category or another category (such as sports, local programming, etc.) and irrespective of whether the program is claimed by IPG, MPAA or no party. IPG's 99 station data makes these distinctions, resulting in fewer measured broadcasts and broadcast hours.

revised royalty awards to IPG and MPAA should be adopted by the Librarian of Congress, or whether they are arbitrary or contrary to the provisions of the Copyright Act, title 17, United States Code. In making this recommendation, the Register has reviewed both the initial report of the CARP and the revised report, including the petitions to modify both reports filed by the parties. For the reasons stated below, the Register concludes that both the initial report and the revised report are arbitrary and must be rejected.

Review of the initial report and the revised report reveals a number of arbitrary actions by the CARP. These include: (1) Failure to adequately explain the evidence supporting the CARP's reversal of its award of Dramatic Moments in Black Sports History from IPG to MPAA; (2) failure of the CARP in its initial report to adjust downward IPG's requested distribution percentage after the CARP eliminated a number of IPG's claimed programs; (3) failure of the CARP in its initial report to adjust upward MPAA's requested distribution for IPG given the number of programs which the CARP credited IPG; (4) failure of the CARP in the revised report to adjust both IPG's and MPAA's requested distributions in light of the final programs credited to IPG; (5) failure of the CARP to base any of its downward deductions to both IPG's and MPAA's methodologies (based on the CARP's criticisms) on record evidence; and (6) adoption by the CARP of a distribution methodology that arguably has little relationship to the marketplace value of the programs. In recommending rejection of the CARP's determination, the Register focuses her discussion on the second failure described above—the lack of downward adjustment to IPG's requested distribution in light of the programs credited—because it created a fundamental flaw in the CARP's approach that invalidates the distribution awards granted IPG in both the initial and the revised reports.

The CARP's distribution methodology, articulated only in the revised report, is fully discussed above. Briefly recapped, it is the product of two "ranges." First, the CARP utilized the Rebroadcast and Airtime data—the only data categories common to both methodologies—to give the CARP "a sense of the relative positions of MPAA and IPG represented claimants in the 1997 marketplace." Revised Report at 18. This produced the first range for locating the CARP's final awards. Then, the CARP utilized "the parties competing requests for allocations and the formulas presented advocating their

averred distribution percentages," adjusting them by applying deductions reflective of the CARP's criticisms of the respective methodologies. This produced the second range for locating the CARP's final awards. The second range appears to be the one actually used by the CARP to settle upon its original award of 0.5% to IPG. *Id.*

A critical flaw occurs with the inputs for the second prong of the CARP's methodology. The CARP started with IPG's requested distribution percentage of 0.881%, drawn from IPG's proposed findings of fact and conclusions of law. The 0.881% is an inflated percentage, however, because it was based upon inclusion of all programs originally claimed by IPG. Earlier in the CARP's initial report, it spent considerable time discussing the validity of IPG's claimed programs and found a number of the claims invalid. *See*, Initial Report at 72–74 (royalty allocation for *Dragon Ball Z* to MPAA; no royalty allocation for *Enchanted Tales* and *Thumbelina*; royalty allocation for *Dream Big* to MPAA; no royalty allocation for *Bottom Line*, *By River By Rail*, *Til Earth and Heaven Ring*; no royalty allocation for *Lou Rawls Parade of Stars*; no royalty allocation for *Psychic Friends*, *Psychic Friends Network*, *Psychic Revival Network*, *Psychic Solution*, *Psychic Talk*, *Psychic Talk 2*, *Psychic Talk USA*, *Psychic Talk Thirty*). These programs were included in IPG's 0.881% request. It was therefore arbitrary for the CARP to accept the 0.881% figure as a starting point because it had eliminated many of the programs that produced this number.

Likewise, the CARP made the same error when it looked at the distribution percentage for IPG yielded by MPAA's methodology. MPAA's distribution percentage of 0.012% was based on only seven programs credited to IPG. However, in its initial award, the CARP credited IPG with far more than just seven programs. It was therefore arbitrary for the CARP to use the 0.012% figure as a starting point for its application of MPAA's methodology.

In sum, the faulty inputs to the second prong of the CARP's methodology make the range generated by that prong wholly inaccurate, thereby rendering the initial award erroneous. The revised report, since it merely takes the original award to IPG and makes a median change to it based upon the reduction in programs credited to IPG, is likewise erroneous. Although there are other serious flaws in the CARP's approach, as described above, the Register need go no further. The CARP's determination must be rejected, and the

Librarian must substitute his own determination.

Part Two—Recommendation of the Register

This is not the first time that the Register of Copyrights has recommended, and the Librarian of Congress has accepted, a rejection of a decision of a CARP. In most of those cases, the Register has recommended that only portions of a CARP's decision be rejected, *see*, e.g., 61 FR 55653 (October 28, 1996)(cable distribution); 62 FR 55742 (October 28, 1997)(satellite rate adjustment). In one case, the Register recommended that the Librarian reject the royalty rate established by the CARP, and substitute his own determination. 63 FR 25394 (May 8, 1998)(digital performance right in sound recording rate adjustment).

Section 802(f) of the Copyright Act provides that "[i]f the Librarian rejects the determination of the arbitration panel, the Librarian shall * * * after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be." 17 U.S.C. 802(f). As discussed above, the distribution methodology applied by the CARP in this proceeding is so flawed that any distribution percentages generated by it are inherently arbitrary. As a consequence, there must be an independent review of the record to resolve this proceeding.

Distribution Criteria

Section 111 does not prescribe the standards or guidelines for distributing royalties collected from cable operators under the statutory license. Instead, Congress decided to let the Copyright Royalty Tribunal "consider all pertinent data and considerations presented by the claimants" in determining how to divide the royalties. H.R. Rep. No. 1476, at 97 (1976). In the first cable distribution proceedings, the Tribunal fashioned five distribution criteria: three primary criteria and two secondary criteria. The three primary criteria were: (1) The harm caused to copyright owners by secondary transmissions of their copyrighted works by cable systems; (2) the benefit derived by cable systems for secondary transmissions of the copyrighted works; and (3) the marketplace value of the works. The secondary criteria were: (1) the quality of the copyrighted program and (2) time-related considerations. *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998). In 1989, the Tribunal eliminated the secondary criterion of program quality from its consideration. 57 FR 15286, 15303

(April 27, 1992). In 1998, the Librarian determined that a CARP did not act arbitrarily by eliminating the primary criterion of harm to the copyright owner. *NAB*, 146 F.3d 907 (D.C. Cir. 1998).

In considering the value of programming in a Phase II cable distribution proceeding, we must simulate the marketplace for that programming. Under the statutory license regime of section 111, programs are not bought and sold in the open marketplace—the statutory license substitutes for the marketplace. Cable operators pay an established fee for the privilege of retransmitting all the programs contained on a particular broadcast signal, rather than license the programs individually. However, just because cable systems pay a single fee for all the programs does not mean all the programs are of equal value. The established distribution criteria, as modified, must be applied in an effort to simulate a marketplace for these programs where one does not exist because of section 111. We now turn to a consideration of the evidence presented by MPAA and IPG as to the value of their programs.

The Programs

Before considering the appropriate methodology for distributing the 1997 cable royalties in the syndicated programming category, the programs to be credited to MPAA's and IPG's royalty distribution claims must be determined.¹² In the Librarian's June 5, 2001 Order, IPG's program claim in this proceeding was pared down to the following eight programs: *Algo's Factory*; *Jack Hanna's Animal Adventures*; *Harvey Pennick's Golf Lessons*; *Mom USA*; *Sophisticated Gents*; *Nprint*; *Just Imagine* and *The Sports Bar*. Order in Docket No. 2000–2 CARP CD 93–97 at 1 (June 5, 2001). Each of these programs is claimed by Litton Syndications. IPG claims an additional two programs on behalf of

Litton: *Dream Big* and *Dramatic Moments in Black Sports History*.

A. Dream Big

Dream Big is listed in exhibit D of IPG's written direct case as belonging to Litton. Litton's representation agreement with IPG lists *Dream Big* as a program claimed by Litton, and the representation agreement contains the following boilerplate language:

Principal (i.e. Litton) warrants that to the best of Principal's knowledge Principal has the right to collect the Distribution Proceeds to Programs, and has not previously conveyed the right to collect the Distribution Proceeds to any third party.

Representation agreement at 2, clause 7. At hearing, on cross-examination of IPG's witness Raul Galaz, the following exchange took place:

Q: The program *Dream Big*, Mr. Galaz, do you know who the copyright owner of that program is?

A: No.

Q: And, again, do you know who the syndicator of that program is?

A: My understanding is that Litton Syndications is the syndicator.

Q: And do you know, again, the nature of the particular right or interest owned by Litton with respect to their entitlement to Section 111 royalties?

A: No, I don't know whether they are, additionally, an owner.

Q: I didn't hear you. I'm sorry.

A: I don't know whether they are, additionally, an owner or not.

Tr. 1063–64. No additional testimony regarding *Dream Big* took place.

In its petition to modify the initial decision of the CARP, IPG requests that the Librarian reopen the record to admit a copy of an agreement between Warner Vision Entertainment and Litton which, according to IPG, conclusively proves that Litton holds the syndication rights to *Dream Big*. The agreement states that Warner Vision "hereby grants to Litton, and Litton hereby accepts, the right to syndicate a children's audio-visual series tentatively entitled 'Real Kids.'" IPG Petition to Modify CARP Report at appendix 2. IPG asserts that Warner Vision is a subsidiary of Warner Bros., and that "Real Kids" is the initial name for *Dream Big*.

MPAA claims *Dream Big* in exhibit D of its written direct case. *Dream Big* is identified on MPAA's Alpha List (a listing of all programs broadcast in 1997 and including both MPAA-represented and IPG-represented programs) as belonging to Warner Bros. MPAA also obtained a program certification form from Warner Bros. that lists *Dream Big* as a Warner Bros. program. The certification form, signed by Michael

Troxler, Vice President of Finance, contains MPAA's boilerplate language stating that Warner Bros. is entitled to receive 1997 cable royalties for *Dream Big* by virtue of being "An officer (if a corporation) or a partner (if a partnership) of the legal entity identified as the owner or the authorized agent of the owner of the programs on the printout." IPG Exhibit 7XR at 389. Other than the cross-examination of Mr. Galaz identified above, MPAA did not put forth any further information at hearing regarding *Dream Big*.

In reaction to IPG's request to reopen the record and have the Librarian consider the Warner Vision/Litton agreement, MPAA submits an April 11, 2000, letter of Michael Troxler of Warner Bros. stating:

WarnerVision is the rightful copyright holder to the series *Dream Big*. This was subdistributed on behalf of WarnerVision by Litton for a clearance fee based upon U.S. coverage. Since Litton was paid a clearance fee, they are not entitled to any of the Cable Copyright Royalties.

MPAA Reply to IPG Petition to Modify CARP Report at appendix 2.

In *National Broadcasting Co., Inc. v. Copyright Royalty Tribunal*, 848 F.2d 1289 (D.C. Cir. 1988), the Court reviewed the Copyright Royalty Tribunal's attempt to resolve competing claims for the program *Little House on the Prairie*. NBC created and produced the program and granted to Worldvision, Inc. exclusive rights to distribute the program for a period of 35 years. The Tribunal determined that Worldvision, as the exclusive syndicator of the program, was the party entitled to section 111 royalties. The Court upheld this conclusion, stating:

The CRT determined that the directly affected party [from the harm caused by retransmission of the program by cable systems] will typically be the exclusive syndicator, and that the CRT will therefore as a general rule always distribute royalties initially to the syndicator. This presumption by the CRT, in the face of congressional silence, is a permissible interpretation of the statute, to which we defer.

848 F.2d at 1296.

Examining the record evidence, the Register cannot ascertain who is currently the exclusive syndicator of *Dream Big*. The non-record evidence, even if admitted, still does not resolve the issue. And section 802(f) of the Copyright Act states that the Librarian shall base his decision only upon the record evidence.

Given the dearth of record evidence, it would be arbitrary for the Register to recommend that *Dream Big* be awarded to either MPAA or IPG. Consequently,

¹² As a practical matter, the focus will be on the programs represented by IPG. The reason for such focus is obvious. There are only two claimants in this proceeding: one that represents most of the programs eligible for distribution (MPAA), and one that represents only a few (IPG). Once it is determined which IPG-represented programs are eligible for a distribution of the 1997 royalty funds, the value of those programs can be ascertained and IPG's distribution share can be established. Assuming that ineligible and unclaimed programs are excluded from consideration, there is no need to focus on the eligibility of MPAA programs (except as they affect IPG's claim to the same program), since the remainder of the 1997 fund will go to MPAA once IPG's share is deducted. But see discussion of MPAA's methodology, *infra*.

the Register recommends that the only acceptable course of action is to seek further evidence from the parties to determine the proper status of the program when the proceeding is remanded to a new CARP.

B. Dramatic Moments in Black Sports History

Dramatic Moments in Black Sports History ("Dramatic Moments") is also claimed by both MPAA and IPG. The record for Dramatic Moments is as follows.

IPG identifies *Dramatic Moments* in exhibit D of its written direct case as belonging to Litton. The program is identified in Litton's representation agreement with IPG and contains the same contract warranty provision that applies to *Dream Big*. At hearing, the following exchange took place on cross-examination of Mr. Galaz, IPG's sole witness.

Q: Okay. The program *Dramatic Moments in Black Sports History*, do you know who the copyright owner of that program [is], Mr. Galaz?

A: No.

Q: Do you know the syndicator?

A: My understanding is that Litton Syndications is the syndicator.

Q: And do you know the particular right or interest owned by Litton relative to their entitlement to Section 111 royalties?

A: Whether it's as the owner or syndicator, I don't know.

Q: But if it is the owner or syndicator, do you know who they—when they acquired and how they acquired the right? If they are a syndicator, not if they're an owner?

A: Restate your question.

Q: If they're a syndicator, if indeed they are the syndicator, do you know how that right was acquired?

A: Well, they can be both the owner and the syndicator.

Q: Right.

A: So your question was asking whether or not

Q: Right. If they—

A:—the nature of the right, and the nature of the right could be as both the owner or the syndicator. I don't know which.

Q: You don't know whether they're the owner as well as the syndicator?

A: My understanding is that they're the syndicator. I do not know whether they are, additionally, the owner.

Tr. 1062–63. No further record evidence was presented by IPG regarding the program.

In exhibit 3 of its written direct case, MPAA identifies *Dramatic Moments* as part of its claim. The program appears on the revised Alpha List of MPAA

programming, identifying New Line Cinema as the claimant. MPAA presented a program certification form for New Line Cinema, which states that New Line is an officer or partner of the "legal entity identified as the owner or the authorized agent of the owner of the programs on the printout." IPG ex. 7XR at 188. The certification is signed by Frank A. Buquicchio, who identified himself as the Senior Vice president of Television and Ancillary Accounting for New Line. Other than the cross-examination of Mr. Galaz, MPAA presented no other evidence as to the ownership of *Dramatic Moments*.

In its petition to modify the further report of the CARP, IPG argues that the burden should be on MPAA to prove its claim to *Dramatic Moments*. IPG asserts that MPAA did not produce the program certification forms until one day before the start of the hearings, thereby precluding IPG's ability to prepare an effective cross-examination on program ownership. IPG further asserts that if the Librarian cannot resolve the proper ownership of the royalties attributable to *Dramatic Moments*, the money should be placed in escrow to permit resolution between Litton and New Line Cinema.

As with the case of *Dream Big*, neither IPG nor MPAA have presented sufficient evidence to permit a determination as to who should receive credit for *Dramatic Moments*. Consequently, the Register recommends that further evidence must be adduced on remand to resolve the status of this program.

The Evidentiary Presentations

As discussed above, IPG and MPAA presented competing statistical methodologies to support their claims to the 1997 syndicated programming royalty pool. MPAA's presentation operates from the assumption that viewership of programs retransmitted by cable operators in 1997 is the way to measure the value of those programs, and provides a sample survey purporting to gauge viewing. IPG's presentation operates from the assumption that every program retransmitted in 1997 has value and should be compensated from the royalty pool, and provides a sample survey that attempts to value each program based upon the royalty fees generated by television stations broadcasting the programming.

A. MPAA's Presentation

1. *Description of the methodology.* MPAA's written direct case consists of the testimony of Marsha Kessler, Vice President of Retransmission Royalty

Distribution at MPAA, and the nine exhibits that she sponsors. In addition, MPAA designated the direct testimony and exhibits of Paul Lindstrom, Leonard Kalcheim, and James Von Schilling from Docket No. 97–1 CARP SD 92–95 (1992–1995 satellite royalty distribution) and the direct and rebuttal testimony and exhibits of Marsha Kessler, Allen Cooper and Paul Lindstrom from Docket No. CRT 91–2–89CD (1989 cable royalty distribution). During the course of the proceeding, at the behest of the CARP, MPAA presented two additional witnesses: Paul Lindstrom of Nielsen Media Research and Thomas Larson of Cable Data Corporation.¹³

MPAA attempts to demonstrate the marketplace value of movies and syndicated programs retransmitted by cable systems in 1997. As it has done in previous royalty distribution proceedings before the Copyright Royalty Tribunal and the CARPs, MPAA submits that the best way to determine the marketplace value of a television series or movie is to examine how many people watched the program in the given distribution year. The greater the number of people who watched the program, the more valuable the program is. MPAA notes that in cable and broadcast markets where programs are bought and sold without the constraint of a compulsory license, broadcasters purchase the rights to broadcast a particular program based upon the number of viewers they believe the program will attract. The same is true for cable programmers. Kessler Direct at 12–13. And advertisers are willing to pay broadcasters and cable programmers higher fees to have their ads aired during programs that attract many viewers. *Id.* Thus, from MPAA's perspective, viewer avidity for a particular program is the best determinative of the program's marketplace value.

MPAA constructs a study—a sampling of the cable retransmission universe in 1997—that attempts to demonstrate the amount of viewing that the programs claimed by MPAA and IPG garnered on broadcast stations that were retransmitted on a distant basis.¹⁴ It is not a study that reveals how many people in the United States actually watched a given program; the cost of such an undertaking would be too high.

¹³ MPAA also presented testimony from David E. Farbman regarding activities of IPG's principal, Raul Galaz. His testimony is not relevant to the calculation of royalty shares.

¹⁴ The study only attempts to estimate viewership for programming retransmitted by cable systems on a distant basis, since local retransmissions of the same program are not compensable under the cable license. See 17 U.S.C. 111(d)(3)(A).

Rather, the MPAA study generates estimates of viewing, described as total household viewing hours (HHVH) for each program claimed by MPAA and IPG.

MPAA's study utilizes data from three sources—Cable Data Corporation ("CDC"), TV Data and Nielsen Media Research ("Nielsen"). MPAA Proposed Findings at 20, ¶ 55. First, MPAA determines the number of television stations that it wishes to include in its survey. For the 1997 study, MPAA selected 82 TV broadcast stations. These stations were retransmitted by Form 3 cable systems (MPAA excluded Form 1 and Form 2 systems) and account for 92.5% of aggregated subscriber instances. *Id.* "Aggregated subscriber instances," means that subscribers receiving broadcast programming were viewing it on a distant signal basis only, since section 111 of the Copyright Act does not allow compensation for programming that is retransmitted on a local basis. Thus, the 82 stations used in MPAA's study account for 92.5% of distant signal viewing of MPAA and IPG programs. This data was supplied by CDC.

Next, MPAA consults the TV Data television log books to determine what programs were broadcast at what times. For 1997, MPAA examined the log books for the 82 stations it included in its survey. Exhibit 3 of MPAA's written direct case identifies the programs which MPAA claims that it represents in this proceeding, along with the number of broadcasts of each program on the 82 stations surveyed. Of the over 3,700 titles, over 500 of these are television series (sitcoms, dramas, etc.) while the remaining titles are movies. MPAA Proposed Findings at 14, ¶ 42. MPAA makes great effort to demonstrate that its claim includes most of the top-rated syndicated television series and movies. Kessler Direct at 6–7.

Finally, MPAA takes the programming data from these two sources and matches it to viewing data supplied by Nielsen. Nielsen provides the names of the programs that were broadcast for each station in the study, the number of 15-minute segments (referred to as quarter hours (QH)) each program aired on that station, and what MPAA describes as the average number of cable subscribers who viewed each program on that station on a distant basis. Kessler Direct at 8. Using this information, MPAA then calculated the household viewing hours for each program appearing in the study. The formula that MPAA utilized to make this calculation is as follows:

$$(\Sigma QH/4) \times \text{average DCHH} = \text{HHVH}$$

Id. Marsha Kessler stated the formula thus:

Add together the total number of 15 minute (QH) segments a program is broadcast in a particular time slot on a particular station. Divide that number by 4 to get an hourly measure. Multiply the result by the average number of distant cable households (DCHH) that actually watched [the] program on that station during that time period.

Id.

It is important to note that the data supplied by Nielsen does not attempt to measure viewing 365 days a year. Rather, Nielsen conducts "sweeps"—limited periods of time in which actual viewing to programming is measured. Nielsen can only provide viewing data for four or six sweeps periods, meaning that substantial portions of the year are not measured. To counteract this problem, MPAA devised a method for interpolating viewing for those periods when Nielsen data is not available. Using data supplied by Nielsen, MPAA assigns an estimated number of viewers for a given broadcast station for a given quarter hour in a given day. For example, there are no Nielsen sweeps in June. To determine viewership for a program broadcast on a specific station during a specific time period in June, MPAA averages the viewing for the same time slot in May (a sweeps month) and July (also a sweeps month) to estimate what viewership would be for the corresponding time slot in June. The process is described as straight line interpolation. Tr. 1615–16.

Once armed with household viewing data for all programs broadcast by the 82 stations in its survey, MPAA determined the household viewing hours for all of its programs and IPG's programs. MPAA determined that the total household viewing hours for MPAA and IPG programming was 3,476,625,750. MPAA Proposed Findings at 73, ¶ 291. MPAA's programming received 3,476,218,917 household viewing hours, while IPG's programming received 406,833. *Id.* This calculation was based on MPAA's assignment of household viewing hours to the following IPG programs:

Algo's Factory—11,707 viewing hours.

Harvey Pennick's Private Golf Lessons—5,193 viewing hours.

Jack Hanna's Animal Adventures—372,488 viewing hours.

Mom USA—0 viewing hours.

Nprint—1645 viewing hours.

Sophisticated Gents—7010 viewing hours.

The Sports Bar—8790 viewing hours.

Id. at 72, ¶¶ 285–291. Missing from this calculation is *Just Imagine*, which

the Librarian has credited to IPG's claim. See June 5, 2001 Order at 2.

Based on its household viewing hour calculations, MPAA claims that it is entitled to 99.9871% of the 1997 cable royalties, while IPG is entitled to 0.0117% of the royalties (for the seven Litton programs). MPAA Proposed Findings at 73, ¶ 291.

2. *Validity of the methodology.*

Throughout the course of this proceeding, IPG has attempted to sully both the construct and the application of the MPAA methodology. Many of these criticisms were accepted by the CARP. See, generally, Initial report at 102–103; Revised report at 5–12. We now consider these criticisms as part of our evaluation of the evidentiary presentation of MPAA.

At the outset, we affirm what the Copyright Royalty Tribunal long ago stated: that actual measured viewing of a broadcast program is significant to determining the marketplace value of that program. 51 FR 12792, 12808 (April 15, 1986). In a perfect world, we would know all viewing to all programs that were retransmitted on a distant basis by all cable systems in 1997. We recognize that the cost of attempting to present such evidence would be prohibitive. Even if we had access to such information, the inquiry would not end there because there are other factors besides viewing that can have a bearing on the marketplace value of a program. Because we are charged with the task of simulating the marketplace for a broadcast program in an effort to determine the value of the program, the Register must consider those factors, where relevant, in the equation as well.

Given the recognition that viewing of programs has probative value, we turn to a consideration of MPAA's presentation. The construct of MPAA's methodology is generally similar to that presented in previous cable distribution proceedings before the Tribunal and the CARPs. There are, however, some notable differences. In prior proceedings, particularly at Phase I, experts from Nielsen participated in the construct and presentation of the study, as well as supplying the viewing data. Nielsen's participation in MPAA's study in this proceeding is limited to providing select data for use by others. Lindstrom Tr. 1387–88; 1407; 1421; 1439–42. Consequently, we have refrained from describing the 82 sample station survey as the "Nielsen" survey. In addition, MPAA has derived a considerable volume of viewing hours from a process described as "interpolation," which it has not presented extensively in prior

proceedings. "Interpolation" is discussed *infra*.

When the MPAA presented its viewing study to the Copyright Royalty Tribunal in Phase I proceedings, the Tribunal described the study as a good "starting off point." 57 FR 15286, 15288 (April 27, 1992) (1989 cable Phase I distribution). Is the MPAA's 82 station sample survey a "good starting off point" for this proceeding?¹⁵

The CARP concluded that MPAA's 82 station sample survey was "stretched to cover more ground and answer more questions than it was originally designed to do." It listed eight specific criticisms of the MPAA approach:

- MPAA's direct testimony did not sufficiently lay the foundation for the survey or explain its results.
- The Panel was forced to call its own witnesses, Mr. Lindstrom from Nielsen, and Mr. Larson from Cable Data Corporation to explain their methods of data acquisition and reporting.
- The number of sampled stations has declined without adequate explanation.
- Station criteria excluded Form 1 and Form 2 cable systems.
- The number of "zero" viewing hours shows the flaw in attempting to use the Nielsen data as a proxy for the retransmission market especially since Nielsen had 24 hour sampling capability in 1997.
- There are unanswered technical questions regarding relative error rates and mixing diary and meter data.
- The method of interpolation of non-sweep month estimated viewing needs statistical validation.
- There is an overvaluation of WTBS and under-valuation of the other Superstations in the survey.

Initial report at 102–03. There is a theme underlying this critique of MPAA's case that can be summarized as follows: the broad brush that is used to paint the big picture is a poor tool for crafting the details. MPAA's viewer study can paint a statistically useful picture of how much sports programming, for example, the viewing public watches relative to the amount of syndicated programming it watches. But when the same study is used in an effort to determine how much the viewing public watches an individual television program, the accuracy of the results

comes into question. Accord 51 FR 12792, 12817 (April 15, 1986) (1983 cable Phase II distribution) ("[O]verall reliability [of the Nielsen study] may be somewhat less when the focus is on individual programs.").

How much confidence can we place in the results yielded by MPAA's 82 station sample survey? MPAA does not provide an answer. Section 251.48(f)(4) requires parties submitting studies involving statistical methodology to provide confidence levels for the methodology. Specifically, the rule requires calculation of the standard error for each component of the methodology. 37 CFR 251.48(f)(4)(ii). MPAA acknowledges that it did not comply with the rule, but offers that "the absence of relative error figures has raised no bar to significant reliance on the Nielsen study in [prior] Phase II proceedings." MPAA Reply Findings at 38.

Regardless of what may have sufficed in prior proceedings before the Copyright Royalty Tribunal, there is reason to believe there is considerable relative error in MPAA's results in this proceeding. On cross-examination, Paul Lindstrom stated the following:

Q: In past CRT proceedings, it's my understanding that Nielsen reports have been entered into the record, is that correct?

A: That is correct.

Q: And when Nielsen reports have been entered into the record, they have come with qualifications or characterizations to assist the parties and the Panel understand the data and the relative errors, standard error factors and the like, is that correct?

A: It is correct that we have produced the relative error figures for the category data.

Q: And did you produce relative error figures for the 1997 data?

A: The relative error figures were not produced by us because the final data would not be produced by us. We're basically developing a database which is being passed on to Mr. Larson who then takes it and produces the aggregated report. The standard errors are really relevant on the aggregated data and so we're kind of a mid-product in the process.

Q: Is there any—in Mr. Larson's work would you consult with him so that he makes proper assessment of the data?

A: We have had opportunities at times where we have needed to work together in order to work out issues or to make clear on definitions or categorizations, but on a day to day basis, he's not directing us on how to produce our portion of it and we're not directing him on how to produce his.

Q: But again, in terms of the portion you produced, you basically are asked to produce from your database of data, information regarding quarter hours of viewing to particular stations within a subset of counties that would qualify as distant for purposes of cable copyright rules?

A: That is correct.

Q: And in past proceedings you've aggregated the information into program categories and provided relative errors for that. In this proceeding you have not done that, is that correct?

A: That is correct.

Q: And in past proceedings you have not been asked to address, except in incidental situations specific programs, you have only addressed program categories, is that correct?

A: To the best of my knowledge, yes.

Q: Do you see any difference in Nielsen, just focusing on independent Mr. Larson's responsibilities in terms of the way Nielsen data for purposes of this proceeding, should be viewed—should it be viewed the same or differently from prior data presented where you do not have program categories, but the data is solely addressed to quarter hours of particular stations?

A: If I'm understanding correctly, I'll repeat what I think I hear you say, is that there is a difference in—I imagine you're talking about the accuracy or use [sic] that word, for aggregated category data versus individual program information and if that's the question, then that is absolutely correct. Once the data is beginning to get aggregated, the sampling errors go down and go down substantially.

Q: But conversely, if it's not aggregated, the sampling errors would increase?

A: The sampling errors for any—again, any given program on any given station on any given day so that we're talking about an individual week, individual program, individual station will be subject to huge relative errors.

Tr. 1406–10.

Mr. Lindstrom's testimony underscores the pitfalls of using MPAA's 82 station sample survey to measure household viewing hours for individual programs. When large amounts of programming and household viewing hours are measured, such as in a Phase I proceeding, the aggregation of the measuring data is substantial and the relative error is low. This is what makes the MPAA's sample survey "a good starting off point." However, when the number of programs and household viewing hours are small, the aggregation of the data is minimal and, in the words

¹⁵ Although the Tribunal never described the Nielsen study as a "good starting off point" for Phase II proceedings, it readily accepted Nielsen results that were presented by MPAA in Phase II proceedings. See, e.g. 53 FR 7132, 7136 (March 4, 1988) (1985 cable Phase II) ("[W]e give great reliance on the Nielsen data")

of Mr. Lindstrom, "subject to huge relative errors." Tr. 1409-10. Of the thousands of programs and billions of viewing hours represented in MPAA's sample survey, IPG's claim only accounts for eight programs and less than 500,000 viewing hours. Although we do not know how large the error factor is for this calculation since MPAA failed to present such information, it is reasonable to presume that it is quite large given that it is drawn from such a small piece of the data. This leads us to the conclusion that, as a methodological approach, it cannot be said that the MPAA sample survey is a "good" starting off point; at best, it is simply "a" starting point.

Having considered MPAA's sample survey conceptually, we now turn to the specifics of its application. As discussed above, the CARP concluded that there were a number of flaws in certain aspects of the sample survey. Although we do not necessarily agree with the number and severity of the CARP's criticisms, there is no need to discuss them here. What matters are what the Register, and ultimately the Librarian, conclude are the flaws in the sample survey, and what impact those flaws have on the usefulness of the MPAA approach.

(i). *Program ownership.* Program ownership is an important and highly contested issue in this proceeding. The issue, however, has centered on the claim of IPG and the programs it has purported to represent in this proceeding. Little attention was given to MPAA's ownership of programs. The CARP requested that MPAA submit program certifications obtained from its member companies, apparently in an effort to resolve issues surrounding certain programs claimed by both MPAA and IPG. MPAA provided these certifications to the CARP as a "courtesy," carefully noting that it was not "legally" required to do so. Tr. 2571-73. MPAA's position is that it is not required to prove its program ownership because it will receive all remaining funds in the 1997 syndicated program royalty pool once IPG's claim is established. While it is true that MPAA will receive all funds less IPG's share, program ownership is nonetheless essential to the application of MPAA's methodology.

As discussed above, MPAA's 82 station sample survey is straightforward in its approach. Calculate the universe of programs in this proceeding, determine the total number of viewing hours for these programs, and then calculate the percentage of the total of viewing hours for IPG programs, yielding IPG's royalty distribution

percentage. The so-called "alpha list" submitted by MPAA supposedly contains the household viewing hours for all IPG and all MPAA programs. *Id.* at 28, ¶ 79. The number of IPG programs on this list is known; it is the eight programs of Litton Syndications which the Librarian has determined are properly attributable to IPG. How do we know that all the remaining programs are properly attributable to MPAA? The answer is that we do not know. MPAA created the alpha list, but it did not provide any testimony to verify the accuracy of the list. It may be that the alpha list contains programs which are not properly represented by MPAA. IPG raises concerns about the status of several program certifications submitted by MPAA, including a number of MPAA claimants for which no certifications were submitted. IPG Proposed Findings at 44-48, ¶¶ 153-169. The CARP allowed the record of this proceeding to remain open after argument had ended to allow submission of additional certifications from MPAA. We cannot determine the sufficiency of these additional filings because there is no testimony to review.

The import of these omissions to the confidence to be placed in MPAA's sample survey is considerable. If MPAA's program ownership cannot be verified, then the total number of household viewing hours for programs in this proceeding cannot be verified. What is even more troubling is that if the alpha list does contain programs which are not properly a part of this proceeding, the benefit of those inclusions inures directly to MPAA because the MPAA's methodology measures IPG's claim as a percentage of the total number of household viewing hours. In other words, the more programs—and consequently the more household viewing hours—that are included in the total, the smaller is IPG's percentage share of that total and consequently the smaller is its royalty share under MPAA's formula.

MPAA points out there is no regulation that requires that it put into evidence program certifications. This is correct. However, MPAA is requesting us to accept its methodology as the means of determining the division of royalties in this proceeding. Unless MPAA can prove that it properly represents all the programs it claims on the alpha list, we cannot verify that MPAA's methodology is being correctly applied. We cannot assume that the copyright owners of all the programs claimed by MPAA are actually represented by MPAA simply because it says so.

(ii). *Zero viewing hours.* The amount of zero viewing hours in MPAA's 82 station sample survey—instances where Nielsen recorded no viewing for a particular program—was especially troubling to the CARP, and the CARP penalized MPAA the most for this anomaly. The CARP made the following finding:

The record reveals that 68% of the quarter hours measured by Nielsen were attributed with "zero" viewing. Factoring in broadcasts occurring between 2:00-6:00 a.m. for which the MPAA methodology automatically attributes a "zero" value, a total of 73% of the quarter-hour broadcasts occurring on such stations during such measurement period were attributed with "zero" viewing. With one exception, each station in MPAA's study has a significant percentage of measured quarter-hour broadcasts accorded "zero" viewing, ranging from 26% to 96%. Of the 82 stations in the MPAA study, 64 measured by Nielsen recorded no viewing in excess of 50% of their broadcasts, a figure that increases to 74 of the television stations when "zero" viewing for the 2:00-6:00 a.m. daypart is factored in. Eight stations including the New York affiliate of CBS, WCBS-TV, were credited with "zero" viewing during more than 90% of their measured broadcasts.

The only exception to the significant percentages of "zero" viewing are programs broadcast on Superstation WTBS. The Nielsen study credited WTBS, the most retransmitted station during 1997, with only .5% of "zero" viewing. Inexplicably, the Nielsen "special study" credited other superstations with significant distant cable subscribers with large percentages of "zero" viewing. Of note for example, is WGN-TV, the second most retransmitted station with an average of 28 million distant cable subscribers during 1997. Despite its substantial distant subscribership, WGN-TV was credited with "zero" viewing in 52% of its measured broadcasts. Three other "Superstations" were credited with "zero" viewing ranging between 26% and 62% of their measured broadcasts.

We conclude that of the eight deficiencies we have noted in MPAA's distribution royalties,¹⁶ this "zero" viewing hours deficiency is, by far, the most egregious. The evidence offered by MPAA to explain this perceived deficiency in its methodology was less than enlightening. Mr. Lindstrom, who is not a statistician, clarified that attribution of "zero" viewing does not mean that no persons were watching, only that no diaries recorded viewing, and that any suggestion to the Panel that no viewing occurred would reflect a misunderstanding of the data. But then he stated that the "zero" viewing hour information consists of pieces of data that are imprecise; that they are among a series of estimates that may be either high or low; that such individual quarter hour entries have little usefulness; but that they aggregate up to an accurate result, and "the more imprecise

¹⁶ The word "royalties" should probably read "methodology."

bricks you throw in the pile, the more accurate the overall number is going to be."

Accepting this and other testimony of Mr. Lindstrom at face value, we find that it does not even begin to explain the enormous discrepancies described above regarding the crediting of "zero" viewing hours. There is little if any evidence in this record that these high credits of "zero" viewing hours were offset in 1997 by credits of excessively high units of viewing hours. Thus, we are left with a record that more than merely suggests that the MPAA methodology is significantly defective in the manner in which it credits "zero" viewing hours.

Revised report at 8–10 (citations omitted).

MPAA describes the CARP's rationale as follows: "Wow. That many zeros must mean something. We haven't a clue what it is, but there are just too many of them to ignore." MPAA Reply to IPG Petition to Modify Revised Report at 7. MPAA then summarily concludes that "[t]he zeros mean nothing." *Id.* Contrary to MPAA's assertions, we believe that the zeros mean something. They cannot mean "nothing."

MPAA continues to insist that Mr. Lindstrom has adequately explained the high number of zero viewing hours, assuring that the aggregation of the viewing data makes up for the zeros; "the more of these, sort of, imprecise bricks you throw in the pile, the more accurate the overall number is going to be." Tr. 1432. We make a layperson's observation that when you aggregate lots of zeros, the result is still zero. As the CARP noted, almost three-quarters of the quarter hour viewing measured by Nielsen for the stations in MPAA's 82 station sample survey received a zero, despite the fact that Mr. Lindstrom stated that a zero viewing rating did not mean that no viewing was actually taking place, only that it was not measured. Tr. 1424. To us the extraordinarily high level of zero viewing does not mean that the overall results of MPAA's sample survey are more accurate; rather, it means that the sample survey actually measures much less viewing than MPAA suggests.

WTBS is the one station with a modest level of zero viewing; 0.5% according to the CARP. This is not surprising, given the large number (52 million) of distant cable subscribers to WTBS. What is surprising is the number of zero viewing instances for WGN which had an average of 28 million distant cable subscribers during 1997. Over half of the measured WGN broadcasts resulted in zero viewing. Revised report at 9. Even further, three other superstations had zero viewing ranging between 26% and 62% of their measured broadcasts. *Id.* How is it

possible that some of the most distributed broadcast stations in the cable industry have such little viewing?

MPAA offers a couple of possible explanations for such discrepancies. For WGN, MPAA suggests that the number of zero viewing instances "could be accounted for by the fact that WGN because WGN (sic) satellite feed to distant cable systems includes programs not part of the station's local broadcast program schedule. These programs are not credited to WGN's distant viewing by Nielsen." MPAA Petition to Modify Revised Report at 17–18. This is a *post hoc* speculation, because there is nothing in the record of this proceeding that demonstrates or even suggests that there are substantial differences between the programs contained on the WGN satellite feed distributed to cable operators and the over-the-air feed of the station. MPAA presented no evidence to support this argument. Furthermore, if MPAA's assertion is true, it demonstrates that certain programming contained on WGN is greatly undervalued because Nielsen is not measuring its viewing.

MPAA also points to Mr. Lindstrom's testimony where he states that there could be "loads of reasons" why there are so many instances of zero viewing. Tr. 1424. Unfortunately, Mr. Lindstrom does not describe the "loads of reasons," other than to suggest that the FCC's network nonduplication rules may have resulted in a considerable number of distant programs being blacked out in local markets, and consequently not measured in the sample survey. Once again, there is no record evidence to support Mr. Lindstrom's suggestion. Ms. Kessler's testimony that she was unconcerned about the number of zero viewing instances is not helpful. Even if one assumes that Mr. Lindstrom's observation is correct, the network nonduplication rules only apply to network stations and do not explain the vast amounts of zero viewing on superstations which are considered to be independent stations under the section 111 license.

The considerable sums of zero viewing, and MPAA's failure to explain it, further undermines the value of the 82 station sample survey. The practical effect of zero viewing is to overvalue those few stations in the survey that received more measured viewing, and thereby overvalue the programs broadcast on those stations. Meanwhile, programs that even MPAA admits are seen by some viewers are given no value whatsoever. In the future, if MPAA continues to present a Nielsen-based viewer methodology, it needs to present

convincing evidence, backed by testimony of a statistical expert, that demonstrates the causes for the large amounts of zero viewing and explains in detail the effect of the zero viewing on the reliability of the results of the survey. In addition, MPAA needs to take steps to improve the measurement of broadcasts in the survey to reduce the number of zero viewing hours, thereby increasing the reliability of its study.

(iii) *The 82 station sample.* According to Ms. Kessler, the 82 stations used in MPAA's sample survey were selected because they each had 90,000 or more Form 3¹⁷ distant cable subscribers as identified by Cable Data Corporation. Tr. 242. MPAA chose the 90,000 subscribers as its minimum in selecting its sample of broadcast stations because such criteria "hit virtually all subscribers and accounted for generally all of the money that was paid into the fund during that time." Tr. 243.

During the proceeding, IPG presented testimony that demonstrated that MPAA did not apply the 90,000 subscriber criteria as it claimed. Several broadcast stations with more than 90,000 subscribers were excluded from the survey, and several with less than 90,000 subscribers were included in the survey. IPG written rebuttal at 30–31. In one extreme circumstance, station KDVR was included in the sample survey despite the fact that it had less than 3,000 distant subscribers in 1997. *Id.* at 31. MPAA did not refute this testimony, nor did it explain why certain stations that satisfied the criteria were excluded, while others that did not were included in the sample survey.

We cannot determine what effect, if any, MPAA's selection of stations had on the results generated by its sample survey. Likewise, we cannot determine from the record whether MPAA's failure to apply its 90,000 subscriber criteria was deliberate, or the result of oversight. What is clear is that MPAA's failure to apply its chosen selection criteria consistently further undermines our confidence in the accuracy of the results generated by its sample survey. In the future, when presenting a methodological survey, MPAA needs to rigorously adhere to its announced standards and parameters for the survey.

(iv) *Interpolation.* As mentioned above, the MPAA sample survey submitted in this Phase II proceeding is similar to the one it has submitted in

¹⁷ "Form 3" refers to the statement of account form used by the Copyright Office in collecting royalty fees under the section 111 cable license. "Form 3" cable systems are the largest systems filing with the Office, having in excess of \$292,000 in gross receipts from subscribers for the retransmission of over-the-air broadcast signals.

past Phase I proceedings with one exception. The exception is the use of "straight line," "forward," and "backward" interpolation. The reason for and operation of interpolation is as follows. Nielsen measures viewing of all broadcast stations in the 82 station sample survey for only four months of the year. These measured viewing periods are referred to as the "sweeps." Nielsen also conducts two partial sweep periods, in which some of the 82 stations' broadcasts are measured, but not others.¹⁸ This leaves six full months of unmeasured viewing, plus an additional two months for stations not covered by the partial sweeps periods. If MPAA relied only upon the sweeps and partial sweeps periods to measure viewing of programs, many programs belonging to MPAA members (as well as to IPG) would receive zero household viewing hours because they were broadcast on stations not covered by the sweeps. To compensate for this considerable omission, MPAA developed an interpolation method that allegedly estimates what the viewing might be for these programs had they been included in the sweeps periods.

Briefly described, MPAA's interpolation method makes three measurements in an effort to estimate viewing for programs outside the sweeps period. The first measurement is "straight line" interpolation. In "straight line" interpolation, MPAA ascertained the number of household viewing hours for a specific time period from the two closest sweeps periods, and then took the average of those hours. For example, May and July are sweeps periods, but there is no measured viewing for the month of June. MPAA looked at the May sweeps results and the July sweeps results and applied the average of those results to each corresponding time period in the month of June. Thus, the "straight line" interpolated viewing result for the quarter hour of 10 a.m. to 10:15 a.m. on June 7, 1997, is the average of the measured household viewing hours for that time period for a particular station on May 7, 1997, and July 7, 1997. Tr. 1614-17.

Both "forward" and "backward" interpolation use data obtained from Nielsen meter rankings, as opposed to the data obtained from viewing diaries during the sweeps periods. Meter rankings are different from the diary method in that meter rankings do not capture specific viewing, but rather merely record when a television is on in a given Nielsen household (whether or

not anyone is actually watching it) and what station the television is tuned to. Tr. 1273-74; 1347-50. "Forward" interpolation uses the sweeps household viewing measurement obtained from the viewing diaries for the period preceding the time frame to be measured and multiplies that by the ratio of Nielsen meter rankings for the preceding period and the period to be measured. In the above example, "forward" interpolation takes the corresponding daypart measurement from the May sweeps period and multiplies that by the Nielsen meter ranking for the same daypart in June divided by the May meter ranking for that daypart. Tr. 1616.

"Backward" interpolation utilizes the same approach as "forward" interpolation, except that it uses the sweep data for the period following the one to be measured, as well as the meter ranking from that period. Again, in the above example, the household viewing hours from the July sweeps period would be multiplied by the June meter ranking for the corresponding daypart divided by the July meter ranking. Tr. 1617. After the three interpolated results have been obtained through "straight line," "forward," and "backward" interpolation, they are divided by three to obtain an average number of household viewing hours for the daypart being examined. *Id.* The purported purpose of "straight line," "forward," and "backward" interpolation is to provide more accuracy to the Nielsen meter rankings through the process of averaging. Tr. 1602-03, 1614-17.

We recognize the purpose of interpolation and appreciate that MPAA is forced to estimate viewing for programs broadcast during non-sweeps periods. Our problem with interpolation is the manner in which MPAA presented it in this proceeding. First, MPAA laid no foundation for a statistical methodology that it was presenting for the first time in a cable distribution proceeding. Marsha Kessler is not a statistician who could testify as to the statistical validity of the interpolation approach; and moreover, she did not compile or review the interpolation data presented by MPAA and, apparently, did not participate in the creation of the methodology or its application. Tr. 1603. The interpolated data was created by Tom Larson of Cable Data Corporation who only presented testimony on the interpolated data when called as a witness by the CARP. In the future if MPAA uses viewing studies to present data on household viewing hours obtained through interpolation, MPAA should

present expert testimony as to the statistical validity of the approach, including the confidence intervals for the data.

Second, the testimony establishes that Mr. Larson made the interpolated data calculations, applying "straight line," "forward," and "backward" interpolation "millions of times" in order to generate viewing data for programs broadcast during the 6-8 months of 1997 for which Nielsen did not measure viewing. Tr. 1603. MPAA apparently asks us to trust that Mr. Larson performed these interpolations accurately, because there is nothing in the record that permits verification. This is especially troubling given that more than half of the viewing data presented in MPAA's sample survey is obtained from interpolated results. MPAA should in the future present evidence that permits some verification of the results of interpolated viewing, rather than just total household viewing hours for all programs.

Finally, we note the Copyright Royalty Tribunal's admonition that data that is not specific to programs is unreliable in determining actual viewing of specific programs. 57 FR 15286, 15299 (April 27, 1992) (1989 cable distribution). MPAA's interpolation methodology assigns viewing hours to time slots, not to programs. Tr. 1688-89. It is likely that the viewing assigned these time slots was in many cases derived from programs of a completely different type, perhaps not the same programming category, than the programs measured during the Nielsen sweeps periods. And it is certain that many of the individual programs accounted for by interpolation were not actually transmitted during the period of interpolation. This is particularly troubling given the large amount of total viewing hour data presented by MPAA which was obtained from interpolation.

3. *Relevance of the methodology.* While we agree that viewing of programs is probative in assessing their value in a Phase II proceeding, the results generated by MPAA's sample survey are so unreliable that they cannot support an assessment of IPG's and MPAA's claims in this proceeding. All that can be garnered from the MPAA presentation is that MPAA's claim is large and IPG's is quite small, something that is readily ascertainable from that fact that IPG only represents eight programs in this proceeding. Precisely how small IPG's claim is, which is the task at hand, cannot be ascertained using MPAA's results. Further, MPAA's results cannot be used to establish a zone of reasonableness within which to

¹⁸ The partial sweeps periods are confined, for the most part, to broadcast stations in the top television markets in the country.

place IPG's award because of the high probability of error in MPAA's results. Consequently, we cannot accept MPAA's presentation as providing any basis for the determination of the distribution of royalties in this proceeding.

B. IPG's Presentation

1. Description of the Methodology

IPG's written direct case presents the testimony of Raul Galaz, IPG's president and principal, and the exhibits that he sponsors. As a first-time participant in a cable distribution, IPG did not designate any prior testimony, nor did the CARP request IPG to call additional witnesses.

IPG takes a different approach in attempting to demonstrate the value of programming in this proceeding. Rather than rely on the estimated viewing of a particular program, IPG attempts to determine the value of a program based upon the carriage of the program by cable operators. IPG Proposed Findings at 14, ¶ 42. According to IPG, a cable operator is not interested in the viewer ratings generated by a particular broadcast program it retransmits; rather, it is the overall appeal of all the programs on the broadcast signal that is of value to the operator. Galaz Direct at 6-7. "Overall appeal" is important to the cable operator because the operator attempts to attract as many subscribers as possible to its system. When deciding which stations to retransmit, the operator will attempt to appeal to as wide a subscriber base as possible by providing multiple program opportunities, so-called "niche" programs that appeal to particular tastes.

In some instances it will be the desire of the cable system operator to exhibit certain sports programming, in other instances it may be the desire to have news programming from a market that is of interest to the cable system operator's market, the desire to increase the amount of children's programming offered to the cable system's subscribers, or the desire to carry more game shows.

Id. at 7. According to IPG, in a compulsory license marketplace it is the overall appeal of a broadcast station to the cable operator that determines the value of the programming on that station.

Since overall appeal of a station is equated with value, the greater the number of subscribers to a station, the greater the value of that station and, consequently, the programming on that station. *Id.* at 8. The relative value of the programs contained on the station is determined, according to IPG, by the time placement of the program and the

frequency of its telecast. Thus, a program that is retransmitted in prime-time once a week is of greater value than a program broadcast once a month at 2 o'clock in the morning.

In sum, IPG focuses on four elements to determine program value: (1) The number of distant cable subscribers capable of receiving the program broadcast during 1997; (2) the cable license royalties generated during 1997 that are attributable to stations broadcasting the program; (3) the time placement of the broadcast; and (4) the length of the broadcast. IPG Proposed Findings at 14, ¶ 43.

In order to measure these elements, IPG, like MPAA, surveyed a number of broadcast stations that were retransmitted by cable systems on a distant basis in 1997. IPG sampled 99 stations that were carried on Form 1, 2, and 3 cable systems, and examined all the programs that were broadcast by these stations during 1997. *Id.* at 15, ¶¶ 46-47. Such data comprised approximately 1.1 million logged broadcasts. *Id.* at 15, ¶ 47. IPG then segregated all programming not within the syndicated programming category, leaving only movies and syndicated series.

Because of the parallel between the number of cable subscribers receiving a station and the amount of royalty fees generated by that station, IPG created a factor to weigh the relative significance of any given station and the broadcast of any program on that station. Dubbed the "Station Weight Factor," it was "derived from the concept that the relative significance of any given station should be affected by both (i) the number of distant cable subscribers that could potentially view such station, and (ii) the amount of distant cable retransmission fees generated by such station." Galaz Direct at 11. The Station Weight Factor was created as follows. For each of the 99 sampled stations, IPG summed the figure representing the percentage of subscribers in the survey that received the given station with the figure representing the percentage of total cable royalty fees generated by the 99 sampled stations. This figure was then divided in half. *Id.* The figure generated by this equation equals, according to IPG, the relative significance of each of the 99 sampled stations.

Having determined the relative value of each station—and the corresponding programming on that station—IPG then attempted to determine the relative value of each program on each station by examining the number of broadcasts of the program and its time placement within the broadcast day. In order to do

this, IPG created a factor that uses data on anticipated viewership of all persons during time periods of the day (referred to as "dayparts") in order to weigh the relative significance of any given broadcast. Dubbed the "Time Period Weight Factor," it was determined as follows:

The Time Period Weight Factor was derived from data published by Nielsen Media Research ("Weekly Viewing Daypart" table within the "1998 Report on Television"), reflecting the weekly viewing habits of all persons in 1997. Weekly viewing is stated in terms of the number of television hours viewed during the week, specifies the amount of viewing attributable to specific time periods, allowing allocation amongst such time periods. IPG then determined the "Average Minutes Viewed Per Hour in Viewing Period" (i.e. the "Time Period Weight Factor") in order to apply such Time Period Weight Factor against each and every logged broadcast on the "99 Sample Stations," and according to the period during which such logged broadcast appeared.

Id. at 13.

After ascribing the Station Weight Factor and the Time Period Weight Factor to each broadcast, IPG applied the figures for each broadcast against the length of such broadcast, in order to ascribe a final value to each compensable broadcast. IPG Proposed Findings at 16, ¶ 50.

As a final step to the process, IPG summed the resulting value for its programs and all other programs in its survey and accorded a "Sum Weighted Value" to both these categories of programs. *Id.* at 16, ¶ 51.

In its written direct case, IPG applied its methodology for 43 programs that it believed that it represented in this proceeding. Galaz Direct at 5-6. It determined that IPG-represented programs produced a Sum Weighted Value of 2,3791.7968, as compared to the Sum Weighted Value of 1,369,901.837 for all syndicated broadcasts within the 99 sample station survey. *Id.* at 14. This yielded a percentage of 1.7367519% for IPG programs. Because IPG did not have access to the programs claimed by MPAA, it could not apply its methodology to determine the Sum Weighted Value of MPAA's programs. Consequently, IPG argued that "[t]o the extent that MPAA represents less than 100% of the non-IPG programming appearing on the '99 Sample Stations,' IPG's respective percentage must be adjusted upward." *Id.* at 14-15.

Once proceedings began before the CARP, MPAA produced the program certifications for some, but not all, of its

claimants.¹⁹ Also, during proceedings before the CARP, a number of IPG-claimed programs were eliminated from consideration, either through voluntary dismissal by IPG or as a result of the CARP's rejection of IPG's representation agreements with Jay Ward Productions, Mainframe Entertainment, and Scholastic Productions. IPG Proposed Findings at 53, ¶ 2. IPG then recalculated its own share, and that of MPAA's, and determined that its programs accounted for 0.881% of the aggregated Sum Weighted Value of all programs claimed in this proceeding.

Although IPG's methodology yielded 0.881% for its claimed programs, it argued that it was nonetheless entitled to 2% of the royalty pool. IPG justified the 2% figure based upon certain alleged failures, abuses, and shortcomings on MPAA's part, including: (1) Failure to produce program certifications for 33 of MPAA's claimants, and production of 6 certifications that were not properly authorized; (2) failure to establish entitlement to 1,100 programs that were not, according to a 1986 Advisory Opinion of the Copyright Royalty Tribunal, eligible for compensation in the syndicated programming category; (3) abuse of the discovery process by failing to produce documents underlying its methodology in contravention to Library and CARP discovery orders; and (4) serious shortcomings in the application of MPAA's distribution methodology. *Id.* at pp. 52-55.

2. Validity of the Methodology

This marks the first time that IPG has appeared in a cable royalty distribution proceeding, and the first time its distribution methodology has been presented. As such, we do not have the benefit of prior consideration or acceptance of the IPG methodology by either the Copyright Royalty Tribunal or a CARP, other than the CARP's opinion in this proceeding. We must consider IPG's methodology from a theoretical point of view, as well as examine its particular application to this Phase II proceeding.

At the outset, we note that IPG's methodology attempts to blend two approaches that have been presented to the Tribunal and the CARPs. The first part of the methodology, the Station Weight Factor, is a fee generation approach in that it considers the royalty fees paid by cable systems during 1997 for the 99 broadcast stations used in the

IPG survey. Each of the stations in the 99 station sample survey is ranked from highest to lowest depending upon the amount of fees the station generated for the 1997 royalty pool. IPG submits that the Station Weight Factor is relevant to the marketplace value of broadcast programs because cable systems' decisions to retransmit a particular broadcast station are "based on the 'overall appeal' of the retransmitted station and its ability to generate additional cable system subscribers, not the ratings of a particular program appearing on the retransmitted station." IPG Proposed Findings at 14-15, ¶ 45.

IPG's focus on the value of distant signals to cable operators recalls the Bortz survey that has been presented for many years at Phase I in cable royalty distribution proceedings. The Bortz survey attempts to measure the value of different categories of programming appearing on retransmitted broadcast signals by presenting to persons from cable companies a hypothetical programming budget for a given year, and then asking how much value they place on different kinds of programming (sports, movies, syndicated series, etc.) in compiling their program schedule. 57 FR 15286, 15292 (April 27, 1992). The more value placed on a program category, the more cable Phase I royalties it should receive, according to proponents of the Bortz survey.

The focus on value to the cable operator has been endorsed by both the Tribunal and the CARPs as one of the ways to assess marketplace value, and the results of the Bortz survey have received credit in Phase I proceedings. *See, e.g.* 57 FR 15286, 15301 (April 27, 1992) (1989 cable Phase I) IPG's Station Weight Factor attempts to ride the coattails of the Bortz survey's acceptance by ranking the "overall appeal" of stations as an expression of the value of the programming broadcast on those stations. While it must be true that a station such as WTBS, for example, has a significant "overall appeal" to cable operators by virtue of the number of cable systems that retransmit it, the "overall appeal" does not translate well to a Phase II proceeding dealing with one program category. It is quite possible, and perhaps likely, that the "overall appeal" of stations in the 99 station sample survey is based upon programming that is not in issue in this proceeding. Thus, the reason that so many cable operators carry WTBS may have more to do with Atlanta Braves baseball and Atlanta Hawks basketball than it does with syndicated series and movies. IPG failed to present any evidence that established a clear nexus between the syndicated

programming category and the "overall appeal" of the 99 broadcast stations subjected to the Station Weight Factor.

This is a significant omission which raises serious concerns regarding the validity of IPG's methodology. The Copyright Royalty Tribunal has rejected estimating techniques that are not tied to programming categories because of their inherent unreliability. 57 FR at 15299 (1989 Phase I cable distribution). In the absence of convincing evidence that demonstrates that the ranking of the 99 stations is based upon the syndicated programming category, and not some other, the validity of the Station Weight Factor is not established.

The second element of IPG's methodology is the Time Period Weight Factor. The Time Period Weight Factor uses data from the 1998 Report on Television published by Nielsen. Galaz Direct at 13. The Report on Television provides viewing estimates for early morning (M-F 7-10 a.m.), daytime (M-F 10 a.m.-4 p.m.), prime time (M-F at 8-11 p.m. and Sun. 7-11 p.m.), and late night (11:30 p.m.-1 a.m.) dayparts. For all other dayparts, weekly viewing was extrapolated from the data in the above categories and lumped into the "All Other" category. IPG Exhibit H. These viewing estimates enable IPG to rank the dayparts. Like the ranking of the 99 stations in IPG's sample survey, the ranking of dayparts is not tied to programming. The Nielsen viewing estimates for these dayparts are drawn from viewing of all program categories. In fact, the estimates apparently also include viewing of local stations over-the-air and on cable, cable networks, and VCR recording of programming, which are completely outside the scope of the section 111 license. Tr. 1369. As with the Station Weight Factor, the Time Period Weight Factor is not tied to programming. IPG did not present any testimony establishing a link between syndicated programming and the ranking accorded to dayparts by Nielsen. Unless such link is established, the relevance of the Time Period Weight Factor is in question.

This is our evaluation of the theory of IPG's methodology. In addition, there are specific concerns about its application in this proceeding with respect to the use of daypart data obtained from Nielsen. While we acknowledge that obtaining specific daypart data from Nielsen is costly, the dayparts culled by IPG from the 1998 Report on Television are far too broad because they ignore variations in viewing within dayparts. For example, IPG's methodology assigns the same value to any program broadcast within the 1 a.m. to 7 a.m. daypart. MPAA

¹⁹ MPAA submitted additional certifications to the CARP prior to closing arguments in the case. Tr. 2576.

points out that Nielsen estimates that household viewing falls from 18.9% to 8.2% at 4:30 a.m. and then begins to rise back to 19.7% in the 6:30 a.m. to 7 a.m. half hour. MPAA Proposed Findings at 60, ¶ 261. Thus, a program broadcast at 4:30 a.m. gets the same value under IPG's methodology as a program broadcast at 6:30 a.m., even though it has less than half the viewers. Even within IPG's own construct, which attempts to assign value based on relative viewing, this result is illogical. Dayparts must be broken down into smaller increments before the Time Period Weight Factor could be given any credence.

In addition, IPG's extrapolated daypart data, the "All Other" category, is plainly overweighted. For example, IPG applies the weight applicable to the "All Other" category to the 1 a.m. to 7 a.m. daypart. This is the same weight factor that is applied to programming broadcast between 4 p.m. and 8 p.m., where viewing, according to Nielsen, is considerably higher than in the 1 a.m. to 7 a.m. time frame. The result is that a program broadcast at 3 a.m. is of equal value under IPG's methodology as a program broadcast at 7:30 p.m.²⁰ Further, the 1998 Report on Television contains viewing estimates for the Saturday 7 a.m. to 1 p.m. daypart and the Sunday 1 p.m. to 7 p.m. daypart, neither of which IPG used in its methodology. Instead, IPG applied the "All Other" category to these time periods. As the CARP correctly observed, the value of the "All Other Category" is overstated, thereby inflating the value of IPG's claim. Revised Report at 14.

3. *Relevance of the methodology.* As with MPAA's presentation, we conclude that the results of IPG's presentation are so unreliable that they cannot be used as a basis for determining the distribution of royalties in this proceeding. The theory of IPG's case lacks statistical foundation, and places value on programs unconnected to their actual viewership. The evidence demonstrates that IPG's methodology overstates the value of its claim, although by how much cannot be determined. Given the lack of reliability of the results, IPG's presentation cannot be used as a basis for the distribution of royalties in this proceeding.

Determination

1. *Remand.* Having determined that the results presented by MPAA and IPG

are wholly unreliable, we examined the record to determine if there is any evidence sufficient to base a distribution of royalties. As part of its distribution methodology, the CARP examined the number of rebroadcasts of programs and the airtime of programs contained in both the 82 sample stations presented by MPAA and the 99 stations presented by IPG. The CARP examined this data because it was the only data common to both MPAA's and IPG's presentations. Revised report at 17. This gave an indication of the relative size of MPAA's and IPG's claims; i.e. that MPAA's was large and IPG's small. *Id.* at 18. The CARP then turned to the methodologies presented by the parties and used them as a means of creating final distribution percentages.

We determine that the number of rebroadcasts and airtime of programs contained in the 82 station and 99 station sample surveys cannot form the basis of a distribution. All that data demonstrates is that MPAA's programming dominated the broadcast marketplace, something that is already known. The number of times a program is broadcast and the amount of time it is on the air is no indication of the marketplace value of the program. While the number of times a program is broadcast might intuitively suggest that it is of more value, the opposite is often true. Programs which garner low syndication fees are often broadcast by television stations many times because the rights are cheap. And other programs, such as motion pictures, may be broadcast relatively few times because the rights are expensive, but they are nonetheless of greater marketplace value. Number of broadcasts and airtime are therefore not the answer.

What then is the answer? We determine that the record of this proceeding is insufficient on which to base a distribution determination. The record does not permit us to assess what is the zone of reasonableness for the distribution awards, let alone determine the awards themselves. Given the lack of reliability of MPAA's and IPG's presentations, crafting awards from the current record would constitute arbitrary action.

We conclude that a distribution of royalties cannot be made based on the current record. Consequently, this case must be remanded to a new CARP for a new proceeding under chapter 8 of the Copyright Act.

2. *New proceeding.* In the new proceeding, the parties will be required to submit new written direct cases and present evidence that takes into account the concerns expressed in this Order,

with the new CARP rendering its determination based upon the new record. All procedural and substantive requirements for a CARP proceeding will apply to the new proceeding.

Although the parties will be able to present new cases and new evidence in the new proceeding, there are two matters that have been decided. As discussed above, the Librarian has ruled that IPG represents Litton Syndications for distribution of 1997 cable royalties, and no other claimant. Consequently, in the new proceeding, IPG is barred from relitigating whether it represents other claimants. The Librarian also determined that Litton's claim consists of at least 8 programs, and listed them in the June 5, 2001 Order. This part of Litton's claim is decided and may not be relitigated. Whether there are additional programs that should be credited to Litton's claim (such as *Dream Big* and *Dramatic Moments in Black Sports History*) may be addressed in the new proceeding. Likewise, all other matters as to program ownership, and the proper division of the royalties, are open to consideration in the new proceeding.

The Library will issue a scheduling order for the new proceeding once the arrangements have been made.

Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the initial report and the revised report of the CARP in the above-captioned proceeding, the Librarian determines the following. First, the Librarian has accepted the recommendation of the Register to reject the initial report of the CARP and remand the proceeding to the CARP with instructions for further action. This was done in the June 5, 2001, Order in this proceeding, and the Librarian incorporates that Order as a part of his final determination. See Appendix A.

Second, the Librarian accepts the recommendation of the Register to reject the revised report of the CARP. Third, the Librarian accepts the recommendation of the Register to remand this proceeding to a new CARP for a new proceeding to determine the proper distribution of 1997 cable royalties between MPAA and IPG. The Library will issue a scheduling order for the new CARP proceeding once arrangements have been made.

²⁰ There is record evidence that shows that as much as 30% of IPG's originally claimed programs were broadcast between 1 a.m. and 7 a.m. Tr. 1035-37.

Dated: December 14, 2001.

Marybeth Peters,

Register of Copyrights.

APPENDIX A—LIBRARIAN'S REMAND ORDER DATED JUNE 5, 2001

[Docket No. 2002-2 CARP CD 93-97]

In the Matter of Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds

Order

On April 16, 2001, the Librarian of Congress received the report of the Copyright Arbitration Royalty Panel (CARP) in the above-captioned proceeding. Both the Motion Picture Association of America (MPAA) and the Independent Producers Group (IPG), the two litigants in this proceeding, have filed their petitions to modify and/or set aside the determination of the CARP, and their replies to those petitions.

After a review of the report and examination of the record in this proceeding, the Register recommends that the Librarian reject the decision of the CARP, and remand the case to the CARP for modification of the decision. The Register concludes that the CARP acted arbitrarily in three ways. First, the CARP did not follow the decisional guidelines and intent of the June 22, 2000, Order issued in this proceeding which directed the CARP to dismiss any claimants listed in exhibit D of IPG's written direct case that did not have a written representation agreement with Worldwide Subsidy Group on or before July 31, 1998.

Second, the CARP arbitrarily included two programs—*Critter Gitters* and *Bloopy's Buddies*—in the claim of Litton Syndications, Inc. (represented by IPG) when IPG did not introduce any evidence as to the value of those programs. In addition, the CARP arbitrarily assigned the program *Dramatic Moments in Black Sports History* to IPG without adequate explanation of its decision.

Third, the CARP acted arbitrarily in awarding 0.5% of the 1997 cable royalties to IPG, and the remaining 99.5% of the royalties to MPAA, because it did not provide any explanation of the methodology or analysis it used to arrive at these numbers.

A full discussion of the Register's reasons for these conclusions shall appear in the final order in this proceeding published in the *Federal Register*.

Wherefore, the Register recommends that the Librarian reject the CARP's report and remand to the CARP to take the following actions in modifying its report:

1. That the CARP award royalties to IPG only on the claims of Litton Syndications and not award any royalties to IPG based upon the other claimants in exhibit D of IPG's written direct case;
2. That the CARP credit Litton with only the following programs: *Algo's Factory*; *Jack Hanna's Animal Adventures*; *Harvey Penick's Golf Lesson*; *Mom USA*; *Nprint*; *Sophisticated Gents*; *Just Imagine* and *The Sports Bar*;
3. That the CARP explain its reasons for crediting *Dramatic Moments in Black Sports History* to Litton's claim; and, if it concludes that its initial decision was correct, add the program to the list contained in #2;
4. That the CARP enter a new distribution percentage for IPG, based only on the claim

of Litton and the programs listed in #2 and, if appropriate, #3, and allocate the remainder of the royalties to MPAA; and

5. That the CARP fully explain its reasons and methodology for the distribution percentages it assigns to IPG and MPAA.

The Register further recommends that the CARP be given until June 20, 2001, to report its modified decision to the Librarian and that section 251.55 of the rules, 37 C.F.R., apply to the CARP's modified report, except that the periods for petitions and replies be shortened from 14 days to 7 days for petitions, and from 14 days to 5 days for replies, due to the proximity of the time period for issuance of the Librarian's final order in this proceeding.

So recommended.

Dated: June 5, 2001.

Marybeth Peters,

Register of Copyrights.

So Ordered.

James H. Billington,

The Librarian of Congress.

[FR Doc. 01-31607 Filed 12-21-01; 8:45 am]

BILLING CODE 1410-33-P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

Institute for Environmental Conflict Resolution—Program Evaluation Instruments: Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, U.S. Institute for Environmental Conflict Resolution.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the U.S. Institute for Environmental Conflict Resolution (the U.S. Institute), part of the Morris K. Udall Foundation, is planning to submit 18 proposed Information Collection Requests (ICRs) to the Office of Management and Budget (OMB). Each of these 18 ICRs is a new collection request; they are being consolidated under a single filing to provide a more coherent picture of information collection activities by the U.S. Institute. The proposed information collection is expected to neither have a significant economic impact on respondents, nor affect a substantial number of small entities. The average cost (in lost time) per respondent is estimated to be \$4.91.

Before submitting the ICRs to OMB for review and approval, the U.S. Institute is soliciting comments on specific aspects of the information collection as

described at the beginning of the section labeled "Supplementary Information."

DATES: Comments must be submitted on or before February 25, 2002.

ADDRESSES: U.S. Institute for Environmental Conflict Resolution, 110 South Church Avenue, Suite 3350, Tucson, Arizona 85701. Worldwide web: www.ecr.gov.

FOR FURTHER INFORMATION CONTACT: David P. Bernard, Associate Director, U.S. Institute for Environmental Conflict Resolution, 110 South Church Avenue, Suite 3350, Tucson, Arizona 85701, Fax: 520-670-5530, Phone: 520-670-5299, E-mail: bernard@ecr.gov.

SUPPLEMENTARY INFORMATION:

OVERVIEW

To comply with the Government Performance and Results Act (GPRA) (Pub. L. 103-62), the U.S. Institute for Environmental Conflict Resolution, as part of the Morris K. Udall Foundation, is required to produce, each year, an Annual Performance Plan, linked directly to the goals and objectives outlined in the Institute's five-year Strategic Plan. The U.S. Institute is also required to produce an Annual Performance Report, evaluating progress toward achieving its performance commitments. The U.S. Institute is currently developing a program evaluation system to gather and analyze information needed to assist in producing its Annual Performance Report.

The U.S. Institute is committed to establishing, achieving, and maintaining a national standard of excellence in all its programs, products, and services. To do so, the U.S. Institute requires high quality information concerning effectiveness of its various initiatives. Systematic and ongoing monitoring of program outcomes will allow the U.S. Institute to perform a variety of tasks, including giving individual project and program managers, as well as the Institute's management, the ability to accurately assess and report on program and project achievements. The new evaluation system has been carefully designed to support efficient and economical generation, analysis and use of this much-needed information, with an emphasis on program feedback, learning and improvement.

As part of the program evaluation system, the U.S. Institute intends to collect specific information from participants in, and users of, several of its programs and services. Specifically, five of the Institute's programs and services are the subject of this Federal

Exhibit 2

MPAA-Represented Program Suppliers -- 1997 Cable

ALL AMERICAN GOODSON

ALL AMERICAN TELEVISION, INC.

ALLIANCE INTERNATIONAL RELEASING IRELAND LIMITED

ALLIED COMMUNICATIONS, INC.

AMERICAN BROADCASTING COMPANIES, INC.

AMERICAN FIRST RUN STUDIOS

AMERICAN MARKETING SYSTEMS, INC.

ARTISAN PICTURES, INC.

ATLANTIS COMMUNICATIONS INC.

AUDIO-VISUAL COPYRIGHT SOCIETY, LTD.

BIG TICKET TELEVISION, INC.

BKN, INC.

BOZELL WORLDWIDE, INC. for MUTUAL OF OMAHA

BUENA VISTA TELEVISION

CABLE NEWS NETWORK, LP, LLP

CALIFON PRODUCTIONS, INC.

CANADIAN BROADCASTING CORPORATION

CANAL+ IMAGE UK, LTD.

THE CARSEY-WERNER COMPANY, LLC

CBS BROADCASTING, INC.

CESARI RESPONSE TELEVISION, INC.

CHILDREN'S TELEVISION WORKSHOP

CINAR FILMS, INC.

CINETEL FILMS, INC.

CLASTER TELEVISION, INC.

CME ENTERTAINMENT LLC

COMPACT COLLECTIONS LIMITED

CONAN PROPERTIES, INC. and CE, LLC

CPT HOLDINGS, INC.

CRYSTAL PICTURES, INC.

DIC ENTERTAINMENT, LP

DICK CLARK PRODUCTIONS, INC.

D.L. TAFFNER LTD.

DOW JONES & COMPANY, INC.

MPAA-Represented Program Suppliers -- 1997 Cable

FILM ROMAN, INC.
FISHING THE WEST
FOX FAMILY WORLDWIDE, INC. (F/K/A SABAN)
FTM PRODUCTIONS

GAYLORD PROGRAM SERVICES, INC.
GENERAL MILLS, INC.
GGP/GOLDEN GATE PRODUCTIONS
GOLDWYN FILMS, INC.
GT MERCHANDISING & LICENSING CORP.
GUTHY-RENKER

HALLMARK ENTERTAINMENT DISTRIBUTION, INC.
HARMONY GOLD U.S.A., INC.
HEARST-ARGYLE TELEVISION
HEARST ENTERTAINMENT, INC.
HERITAGE ENTERTAINMENT, INC.
HOME BOX OFFICE, A DIVISION OF TIME WARNER ENTERTA

INTERSPORT, INC.

JEOPARDY PRODUCTIONS, INC.
JIM OWENS AND ASSOCIATES, INC.

KELLER SIEGEL ENTERTAINMENT
KING WORLD PRODUCTIONS, INC.

LACEY ENTERTAINMENT
THE LANDSBURG COMPANY
LARRY HARMON PICTURES CORPORATION
LEVY-GARDNER-LAVEN PRODUCTIONS

MAJOR LEAGUE BASEBALL PROPERTIES, INC.
MEDIAVEST WORLDWIDE, INC. (f/k/a TELEVEST, INC.)
METRO-GOLDWYN-MAYER STUDIOS, INC.

MPAA-Represented Program Suppliers -- 1997 Cable

MICHAEL JAFFE FILMS, LTD.

MODERN MEDIA, INC.

MORGAN CREEK PRODUCTIONS

MOSO PRODUCTIONS

MTG MEDIA PROPERTIES, LTD.

NATIONAL BASKETBALL ASSOCIATION

NATIONAL BROADCASTING COMPANY, INC.

NATIONAL HOCKEY LEAGUE

NATIONAL MEDIA CORPORATION

NEW LINE CINEMA CORP.

NFL FILMS

NGT, INC.

NORTH AMERICAN RELEASING, INC.

OLIVER PRODUCTIONS

ORION PICTURES CORPORATION

OVERVIEW PRODUCTIONS, INC.

PARAMOUNT PICTURES, A VIACOM COMPANY

PATHE IMAGE SNC

PGA TOUR, INC.

PM ENTERTAINMENT GROUP, INC.

POLYGRAM TELEVISION

PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA

PRO FOOTBALL WEEKLY

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

RICHARD SIMMONS, INC.

RYSHER ENTERTAINMENT

SEAGULL ENTERTAINMENT, INC.

SFM ENTERTAINMENT LLC

SHAPIRO-GLICKENHAUS ENTERTAINMENT CORPORATION

SPECTACOR FILMS

SPELLING TELEVISION INC.

STEVE ROTFELD PRODUCTIONS, INC.

MPAA-Represented Program Suppliers -- 1997 Cable
STEVE WHITE FILMS

TBS PRODUCTIONS, INC.
TELCO PRODUCTIONS, INC.
TIME LIFE FILMS, A SUBDIVISION OF TIME WARNER ENTERT
TITAN SPORTS INC.
TOGETHER AGAIN PRODUCTIONS, INC.
TRANSWORLD INTERNATIONAL, INC.
TRIBUNE ENTERTAINMENT COMPANY
TROPICAL BEACHES, INC.
TWENTIETH CENTURY FOX FILM CORPORATION

UNIVERSAL CITY STUDIOS, INC.
UPA PRODUCTIONS OF AMERICA

VENTURE MEDIA, INC.
VILLAGE ROADSHOW PICTURES (USA), INC.

WARNER BROS.
WEISS GLOBAL ENTERPRISES
WESTERN INTERNATIONAL SYNDICATION
WORLDVISION ENTERPRISES, INC.

EXHIBIT B



The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

(202) 707-8350

September 13, 2002

The Honorable Henry H. Kennedy, Jr.
United States District Court for the
District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: United States v. Raul C. Galaz,
Criminal No. 02-230

Dear Judge Kennedy:

The United States Copyright Office ("the Office") thanks the Court for the opportunity to submit the following Victim Impact Statement.

The Copyright Office is a service unit of the Library of Congress and has responsibility for administering the compulsory licenses established by title 17, United States Code, and the Copyright Arbitration Royalty Panels that set rates and terms and determine the distribution of royalties.

A compulsory license is a statutory copyright licensing scheme whereby copyright owners are required to license their works to users at a government-fixed price and under government-set terms and conditions. Section 111 of title 17 of the United States Code allows a cable system to retransmit both radio and television broadcast programming to its subscribers who pay a fee for such service. Likewise, section 119 of title 17 of the United States Code allows a satellite carrier to retransmit television (but not radio) broadcast programming to satellite home dish owners for their private home viewing. Cable systems and satellite carriers are required to submit royalties to the Copyright Office for the carriage of each signal on a semiannual basis in accordance with prescribed statutory royalty rates. These royalties are distributed later to the copyright owners of the broadcast programming.

The first step in the distribution process is that copyright owners claiming to be entitled to cable and satellite royalties are required to file with the Librarian of Congress ("Librarian") claims during the month of July each year for the previous calendar year's royalties. 17 U.S.C. §§ 111(d)(4)(A), 119(b)(4)(A). Once the claims to the cable and satellite royalty funds have been filed with the Copyright Office, the Office examines each claim to determine the timeliness and legal sufficiency of the claim. However, the Office accepts the information provided in each claim as facially valid and, therefore, does not look behind the information provided in the claim.

-2-

The current filing system is founded on trust—trust that the copyright owners and the agents filing claims are providing the Office with truthful information and are authorized to file such claims. Thus, in order to ensure that copyright owners with legitimate claims are rightfully compensated, the system depends upon the honesty of those filing claims. Raul Galaz has broken that trust, and his criminal actions constitute an attack on the integrity of the entire royalty fee distribution process created by Congress.

As Mr. Galaz has admitted, he filed with the Copyright Office several false cable and satellite claims using various “false and fraudulent aliases and fictitious business entities” in order to receive cable and satellite royalties for several years to which he was not entitled. Factual Proffer, filed June 20, 2002, at 1-2. One such fictitious business entity was Tracee Productions. Mr. Galaz filed cable and satellite claims for the years 1994-1996 in the name of Tracee Productions claiming an ownership interest in the cable and satellite royalty funds for the program “Garfield and Friends.” *Id.* at 1-3. As a result of his fraudulent submission of claims relating to “Garfield and Friends,” Mr. Galaz “converted to his own benefit” over \$328,000 of cable and satellite royalty funds. *Id.* at 3.

The Librarian can distribute only those royalties that are not in controversy. 17 U.S.C. §§ 111(d)(4)(B), 119(b)(4)(B). Thus, if copyright owners are able to agree on how the royalties are to be divided among themselves, the Librarian is authorized to distribute the funds. If, however, copyright owners are not able to reach a settlement regarding the division of the royalties, then the Librarian must convene a Copyright Arbitration Royalty Panel (“CARP”) to determine the distribution of the royalties. *Id.* The CARP is comprised of three arbitrators who hear evidence from the copyright owners on how the royalties should be distributed. This is a more costly route, as both the Library’s administrative costs and the arbitrators’ fees are deducted from the funds to be distributed. 17 U.S.C. §§ 801(d), 802(h)(1). Therefore, settlement among the copyright owners is desirable because it avoids the considerable costs of a proceeding before a CARP.

The filing of false claims significantly decreases, if not totally eliminates, the possibility of settlement. When the legitimacy of a particular claimant is at issue, there is a controversy regarding the distribution of the funds, and a CARP must be empaneled to resolve the controversy. For example, as the Court is aware, Mr. Galaz was a participant in the recently concluded CARP proceeding to determine the distribution of 1997 cable royalty funds in the syndicated programming category. The need for this proceeding arose in part because there were questions surrounding the legitimacy of certain claims filed by Mr. Galaz. The Motion Picture Association of America (“MPAA”) deemed it necessary to challenge Mr. Galaz’s eligibility to file claims on behalf of certain copyright owners in a CARP proceeding. The CARP found that Mr. Galaz “made a number of unrealistic assertions about names of parties, companies, and organization names, and royalty claimant status.” CARP Report, dated April 16, 2001, at 42. In fact, it is my understanding that Mr. Galaz has admitted that he testified falsely before the CARP in order to conceal his criminal actions.

The end result is that Mr. Galaz’s deceit increased the costs of the CARP proceeding because of the time the CARP spent determining the validity of Mr. Galaz’s claims. Consequently, legitimate copyright owners have suffered a significant delay in receiving their royalties, and the royalties they ultimately receive will be reduced by the cost of that proceeding.

-3-

The ramifications of Mr. Galaz's crime extend beyond the 1997 cable distribution proceeding. Mr. Galaz, or entities in which he has an interest, have filed cable and satellite claims for the years 1998 through 2001. The Office cannot accept these claims at face value, as the Office has no confidence in the veracity of the information provided therein. Thus, before commencing proceedings to distribute those funds, the Office will need to investigate the veracity of the provided information. Such investigation will increase the Library's administrative costs and will delay the receipt of royalties by legitimate copyright owners.

In addition, the Office will need to reexamine the claims filing system as a whole to determine whether safeguards can be put into place to prevent such flouting of the system in the future. Such safeguards likely will lead to a more costly system, as the Office can no longer afford to accept each claim at face value. Any changes to the filing system which the Office implements likely will lead to more stringent filing requirements, thus making the filing of claims more onerous on all copyright owners. More stringent filing requirements may also increase the amount of time needed for the Office to process the claims, thus resulting in greater administrative expense.

Finally, the Office feels strongly that Mr. Galaz must serve significant jail time for his crime. His criminal actions have resulted in the obtaining by false pretenses of significant funds from the cable and satellite royalty pools deposited with the Copyright Office that should have gone to legitimate copyright owners. His actions have increased administrative costs and delayed the receipt of royalties by legitimate copyright owners.

Furthermore, the Office has reason to believe that Mr. Galaz is continuing to conduct business in the usual course. On the day before his plea hearing, Mr. Galaz was at the Office examining cable and satellite claims. In order to better ensure that Mr. Galaz does not again wreak havoc on the claims filing system and given the administrative costs associated with his future participation in distribution proceedings, the Office also requests that the Court ban Mr. Galaz or any entity in which he has an interest from filing with the Office future cable or satellite claims and from pursuing claims which he or such entities have already filed. The Office requests that such a ban be imposed as part of his sentence and/or as a condition of his supervised release. Such a ban would not infringe Mr. Galaz's rights, as he is not a copyright owner and merely acts as an agent for those copyright owners who have a valid claim. Nor would the rights of those copyright owners represented by him be compromised. Those copyright owners could either file or pursue their claims themselves or could seek new agents to file or pursue claims on their behalf.

To that end, the Office requests that the Court order Mr. Galaz to release all copyright owners with whom he has a contractual relationship from their obligation to have their claims filed or pursued by him or by any entity in which he has an interest. Pursuant to the mandate agreement posted on the website of the Independent Producers Group, such copyright owners have granted to Mr. Galaz the exclusive right to apply for and collect cable and satellite royalties on their behalf. Therefore, these copyright owners are contractually bound to use him or an entity in which he has an interest to act as their agent before the Office. Moreover, it is our understanding that he has every intention of enforcing these agreements and is currently pursuing legal action against copyright owners who, having learned of his fraudulent activities, seek to void their agreements and obtain new representation. Ordering Mr. Galaz

-4-

to release these copyright owners from their contractual obligation will allow them to pursue their claims without incurring the expense to void their contract with Mr. Galaz and will allow them to pursue their claims as they see fit. In addition, such an order would better ensure that Mr. Galaz derives no further financial benefit from this enterprise.

The Copyright Office takes a dim view of the filing of false claims. Accordingly, the Office requests that the Court impose a sentence commensurate with the gravity of Mr. Galaz's crime.

Respectfully submitted,

A handwritten signature in cursive script that reads "Marybeth Peters".

Marybeth Peters
Register of Copyrights

EXHIBIT C

FILE COPY

PICK & BOYDSTON, LLP

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

523 WEST SIXTH STREET, SUITE 1134

LOS ANGELES, CALIFORNIA 90014

TELEPHONE (213) 624-1996

FACSIMILE (213) 624-9073

September 9, 2003

Jeffrey C. Bogert, Esq.
828 Moraga Drive, Suite 101
Los Angeles, CA 90049

Via Facsimile
(310) 476-2135
and U.S. Mail

Re: *Lisa Katona Galaz/Worldwide Subsidy Group,
Independent Producers Group*

Dear Mr. Bogert:

I tried calling you today and left a voice mail, but never heard back from you. I called for several reasons.

First, Raul is in the process of finishing a brief which will be responsive to the MPAA's appeal. As soon as it is done it will be forwarded to you for your review. As you know, we believe that IPG should retain an attorney who has experience with CARP appeals and in that connection have discussed the matter in general non-specific terms with Joel R. Wolfson, Esq., of Blank Rome in Washington, D.C. However, regardless of whether or not you or someone else represent IPG in that matter, we believe that the contents of Raul's draft should be the basis for responsive brief.

Second, please confirm where the CARP files are physically. The last we knew they were still with Arnie Lutzker, Esq. Please let us know if that is the case, or if you have obtained them for IPG.

Third, as you know, a briefing schedule must be filed shortly in the CARP appeal. I believe that it would be in everyone's interest if the due dates for the brief could be pushed out as far as possible, so long as it is at least within the next nine months.

Fourth, given the complexity of the issues regarding the CARP appeal, it would be to IPG's best interest to stipulate with the MPAA and the government to allow briefs in excess of the statutory page limit.

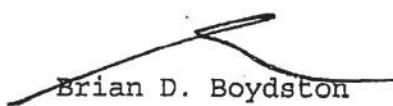
PICK & BOYDSTON, LLP

Jeffrey C. Bogert
September 9, 2003
Page 2

If you have any questions, please give me a call. Thank
you for your attention.

Sincerely,

PICK & BOYDSTON, LLP



Brian D. Boydston

cc: Lisa Katona Galaz
Michael Harris, Esq.

EXHIBIT D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

WORLDWIDE SUBSIDY GROUP, LLC, a)
Texas Limited Liability Company,)
dba INDEPENDENT PRODUCERS GROUP;)
WORLDWIDE SUBSIDY GROUP, LLC, a)
California Limited Liability)
Company, formerly named ARTIST)
COLLECTONS GROUP, LLC,)

Plaintiffs,)

vs.)

Case No. BC 389895

MOTION PICTURE ASSOCIATION OF)
AMERICA, INC., a New York)
Corporation doing business in)
California; and DOES 1 through 10,)
inclusive,)

Defendants.)

DEPOSITION OF RAUL GALAZ
LOS ANGELES, CALIFORNIA
FRIDAY, FEBRUARY 12, 2010

REPORTED BY:
Alejandria E. Kate
CSR NO. 11897

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5 FEBRUARY 12, 2010
6

7 9:17 A.M.
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10
11 Deposition of RAUL GALAZ, held at
12 11377 West Olympic Boulevard, Suite 600,
13 Los Angeles, California, before Alejandria E.
14 Kate, CSR No. 11897.
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1 tarnish the image of WSG?

2 A. No. One of the transfers was because I was in
3 a divorce. And it would have been something that would
4 have been customarily awarded to a divorced spouse.

5 The other transfer was because I needed money
6 desperately for legal fees. And the money that was
7 given to me in exchange, in consideration for that, or
8 so I thought, was money that I, as I said, desperately
9 needed for legal fees.

10 And it immediately got paid -- in fact, the
11 irony there is that it actually got paid because of the
12 timing required. It wasn't paid to me and then paid
13 over to the counsel. It was paid directly, out of the
14 accounts of WSG, to legal counsel.

15 It was subsequently determined that those
16 moneys were not, in fact, moneys to which Marion Oshita
17 was entitled. And that was the basis for the ruling in
18 Lisa Galaz versus Oshita that undid that transaction.

19 Q. So you didn't transfer any interest because
20 you thought that that was -- that would -- your
21 continued affiliation with WSG would tarnish the
22 reputation of the business?

23 A. That's not why I transferred, no.

24 Q. And while you were in prison, do you have any
25 knowledge of how WSG operated?

1 Before you answer that --

2 A. Yeah. I mean it's kind of -- go ahead.

3 Q. I was going to say, before you answer that,
4 just to establish the time frame, we're talking from
5 February 2003 through May of 2004.

6 Do you have any knowledge of how the business
7 operated while you were in prison?

8 A. Very little.

9 Q. Okay. Did you have any involvement in the
10 operation of the business while you were in prison?

11 A. No. And you're not allowed to.

12 I certainly made suggestions as to what should
13 be done, but this was during a time frame where,
14 literally within, I think a week of me becoming
15 incarcerated, Marion Oshita foreclosed all
16 communications, virtually all communications with
17 Lisa Galaz about the company.

18 And that was what was resulted in the lawsuit
19 that Lisa Galaz brought against Marion Oshita.

20 Q. Let's focus on your -- I'm trying to focus on
21 your involvement in WSG while you were in prison.

22 A. Well, the only involvement that I would have
23 would be through information that I would have received
24 from either Lisa Galaz or Brian Boydston.

25 And I didn't -- I wasn't getting any

1 information because they weren't getting any
2 information.

3 Q. Okay. So were you sort of passively receiving
4 information, or did you taken an active role in making
5 decisions of the company or providing advice to either
6 Lisa Galaz or Mr. Boydston?

7 A. I clearly wasn't actively involved.

8 Q. Okay.

9 A. Maybe you don't appreciate the context
10 within --

11 Q. I've never been in prison, so ...

12 A. Okay. Yeah. Well, but you've seen movies,
13 I'm sure, you know. It's not a place where you can
14 conduct business.

15 Q. Okay. And you said you had very little
16 knowledge of how WSG was operating during the period
17 that you were in prison. What did you know about how it
18 operated?

19 A. You know, in a very generalized nature, all I
20 knew was that Marion Oshita wasn't sharing information
21 with Lisa Galaz. I presumed that she was carrying on
22 business in the same manner as -- you know, prior to my
23 incarceration, but, again, didn't have any firsthand
24 knowledge.

25 I hadn't spoken with her, with

1 It doesn't seem immediately familiar to me.

2 Q. And the letter is dated September 9; correct?

3 A. 2003, correct.

4 Q. And September 9 of 2003, you would have been
5 in prison -- you were in prison at that point, were you
6 not?

7 A. Correct. From February 2003 through May 2004.

8 Q. Okay. Now, let me direct your attention to
9 the very first -- the second paragraph of that letter.

10 Do you see that?

11 A. Yes.

12 Q. And please read the first two sentences in
13 that paragraph into the record.

14 A. "First, Raul is in the process of finishing a
15 brief which will be responsive to the MPAA's appeal. As
16 soon as it is done, it will be forwarded to you for your
17 review."

18 Q. Okay. There's probably a typo in that
19 somewhere.

20 MR. BOYDSTON: No. I'm just illiterate.

21 Q. Now, do you understand which MPAA appeal
22 Mr. Boydston is referring to in there?

23 A. Yes, I do.

24 Q. So you drafted a brief in that appeal, did you
25 not?

1 [A. Correct.]

2 Q. Okay.

3 MR. OLANIRAN: And, Karin, September 18,
4 2008, filing?

5 MS. PAGNANELLI: Can I get that back
6 from you?

7 A. (Witness complies.)

8 MS. PAGNANELLI: Okay. What do you
9 want?

10 MR. OLANIRAN: A September 18
11 declaration.

12 MR. BOYDSTON: So this will be
13 Exhibit 28?

14 MR. OLANIRAN: That will be 28, MPAA 28,
15 correct.

16 MR. BOYDSTON: Did they trick you?

17 MS. PAGNANELLI: They did. May.

18 MS. PLOVNICK: I think that Andrew had
19 it before he left.

20 MS. PAGNANELLI: Okay. Yeah. It's at
21 the very end of my pile. Thank you.
22 September 18, 2008, declaration, yes.

23 MR. OLANIRAN: Let's mark that as MPAA
24 Exhibit 28.

25 ///

1 BY MR. OLANIRAN:

2 Q. I assumed that you were reading it.

3 A. I am.

4 Do you need me to read the whole thing or just
5 go to a certain --

6 Q. I'll direct you to a certain point. I just
7 wanted you to be familiar with the document.

8 A. Okay.

9 Q. We have MPAA Exhibit 28 in front of you.

10 And just for the record, it's the -- the title
11 of the document is "Declaration of Raul Galaz in
12 Opposition to Motion for Summary Judgment." And this
13 was filed in the Galaz versus -- I'm sorry, Galaz and
14 WSG versus Jeffrey Bogert lawsuit.

15 And the declaration date is September 13,
16 2008.

17 Do you recognize this document as your
18 declaration?

19 A. Yes.

20 Q. Okay. And let's go to the very last page of
21 MPAA Exhibit 28.

22 Are you there?

23 A. Yes.

24 Q. And is that your signature at the bottom of
25 the page?

1 A. Yes.

2 Q. Okay. Do you see Paragraph 5 on that page?

3 A. Yes.

4 Q. Okay. If you go to -- if you count from the
5 bottom -- count five lines up from the bottom of the
6 paragraph. And look at the sentence that says, "I
7 drafted."

8 Do you see that?

9 A. Correct.

10 Q. And would you please read that sentence into
11 the record.

12 A. "I drafted an appeal brief which I'm informed
13 and believe was delivered to Bogert in which he produced
14 in discovery which could -- which he could have filed to
15 represent plaintiffs more effectively.

16 That sentence?

17 Q. Yes.

18 And which appeal brief are you referring to in
19 this case -- in this declaration?

20 A. This was the appellate brief that I drafted
21 while I was incarcerated. Actually, while we were at
22 the break, I was reminded of that by counsel, because he
23 felt that my testimony before might have offered more
24 clarification.

25 While I was incarcerated, I got ahold of the

1 appellate brief that had been filed by the MPAA and
2 drafted a response to that, knowing that without the
3 assistance of Arnie Lutzker, that it would be very, very
4 difficult for someone to effectively draft a response to
5 that.

6 MR. OLANIRAN: Karin, MPAA 24.

7 A. Give this back to you?

8 Q. Yes.

9 A. Is that the original?

10 MS. PAGNANELLI: No. This one is the
11 original. This one goes to her. This is
12 new. Okay. So this is 24.

13 I'm going to give him 24, but I don't
14 have another one for you.

15 MR. BOYDSTON: That's fine. I don't
16 need one.

17 Q. Would you please take a look at the exhibit
18 that's been marked MPAA 24, Mr. Galaz, please.

19 A. Okay.

20 Q. Have you looked at that?

21 (Document reviewed by witness.)

22 A. Okay.

23 Q. And the -- and for the record, this is the --
24 MPAA 24 is the January 27, 2005, letter from
25 Mr. Boydston to Mr. Bogert; right?

1 than what it says.

2 MR. OLANIRAN: We need a ten-minute
3 break, please.

4 (Whereupon, a recess was held
5 from 12:12 p.m. to 12:19 p.m.)

6 MR. OLANIRAN: I have no further
7 questions for Mr. Galaz.

8
9 EXAMINATION

10 BY MR. BOYDSTON:

11 Q. Okay. I guess I have just one or two kind of
12 follow-up questions, and that's with regard to the brief
13 that you drafted while you were in prison.

14 You remember we saw some exhibits about that?

15 A. Correct.

16 Q. Earlier in your testimony, you were asked if
17 you had done any work for WSG while you were in prison,
18 and I think you said, "No."

19 But then later on you testified that you had
20 drafted up this brief while you were in prison.

21 Is there a reason why you said "no" to the
22 question at first?

23 A. Well, first of all, I wasn't obligated to
24 do -- to do so. I was doing it somewhat as, frankly, a
25 hobby. I wanted to see the well-being of WSG for

1 selfish reasons.

2 Lisa Galaz is a -- was a co-owner of the
3 company. And to the extent that she benefits, my
4 children benefit. So that was certainly my motivation.

5 But from the standpoint of doing the work, it
6 never got utilized. It was basically my opinion as to
7 what brief should be filed if, in fact, a brief were to
8 be filed.

9 But as I understand it, it never was
10 ultimately filed.

11 Q. And were you ever compensated for the efforts
12 that you made in that regard?

13 A. No. And I never sought it.

14 MR. BOYDSTON: I have nothing further.

15 MR. OLANIRAN: Just one quick question.

16 (Whereupon, a discussion was held
17 off the record between the witness and
18 Mr. Boydston.)

19 MS. PAGNANELLI: I have one quick
20 question.

21 MR. OLANIRAN: Go ahead.

22 MS. PAGNANELLI: Are you taking the
23 position that what you guys talk about is
24 attorney-client privilege?

25 MR. BOYDSTON: Yeah.

1 MS. PAGNANELLI: Even though you're not
2 his lawyer?

3 MR. BOYDSTON: No. But he's working for
4 the company. So, yes, obviously what we talk
5 about is attorney-client privileged.

6 (Whereupon, a discussion was held
7 off the record between the witness and
8 Mr. Boydston.)

9 MR. OLANIRAN: Karin, do you have any
10 other questions? We can break and talk if we
11 need to talk. That's fine.

12 MS. PAGNANELLI: I mean, if that's -- I
13 mean, we'll -- obviously we're going to deal
14 with all this stuff later, so, no, I don't
15 have a follow-up on that.

16 MR. OLANIRAN: Okay. And I just want to
17 clarify, following up on the response that
18 Mr. Galaz had to -- well, to Mr. Boydston's
19 question.

20
21 FURTHER EXAMINATION

22 BY MR. OLANIRAN:

23 Q. And will you please look at MPAA Exhibit 18.
24 Mr. Galaz, do you have that in front of you?

25 A. Yes, I do.

1 Q. And your response to Mr. Boydston's question
2 is you were just doing this -- you really didn't have
3 any expectation that it would be used; is that right?

4 A. I had no authority to demand it be used. In
5 fact, my recollection is I didn't -- I certainly didn't
6 give it to Mr. Boydston. I provided it to Lisa Galaz,
7 and then she passed it on to Mr. Boydston is my
8 understanding.

9 Q. Okay. So why would Mr. Boydston be insistent
10 that your draft be used?

11 A. Because I was the only individual that was
12 involved in those proceedings that was still around. It
13 was myself and Arnold Lutzker.

14 Marion Oshita wasn't involved in the
15 proceedings and had no firsthand knowledge of any of
16 the -- even the broad strokes of it, much less the
17 nuances.

18 So from the standpoint of reviewing the Motion
19 Picture Association brief and recognizing where it was
20 in error or how to respond to it, it would be one of two
21 people: Arnold Lutzker, who was no longer acting as
22 counsel at WSG, or myself.

23 If it weren't -- if it -- if Mr. Lutzker
24 weren't around, then the only alternative would be for
25 someone to have sifted through boxes and boxes of highly

1 technical data, figured it out, and then -- and then,
2 you know, divined some sort of response. It was
3 obviously much easier for me to do so.

4 But if you're asking whether I had any
5 authority to demand that it be used, no, of course not.

6 Q. But this wasn't just some casual effort on
7 your part, some intellectual effort to just -- so you
8 ought to write a brief. You wanted the brief to be used
9 for WSG because you were the only one that knew what was
10 going on in the proceeding, at least in your view?

11 A. Well, I think it was an intellectual effort.
12 But of course I wanted it used. I wanted WSG to
13 prevail.

14 Q. So you were working for WSG, whether or not
15 you were compensated for it, which is a different issue.
16 But you were working for WSG?

17 A. Well, I mean, you can characterize it however
18 you want. I mean, if you offer services free of charge
19 to someone and have no authority to demand that they use
20 your services, then I guess you could be.

21 I worked for Habitat for Humanity, you know, a
22 couple of weekends ago. Is that to mean that now I have
23 some sort of authority there? Of course not.

24 Q. I think you're mixing up. I wasn't asking
25 about whether or not you had authority.

1 My initial question was whether or not you did
2 any work for WSG while you were in prison. And I think
3 you said, "No."

4 Now you just --

5 A. That's correct because it was --

6 Q. Let me finish.

7 A. -- not utilized.

8 Q. Let me finish my question. You can't
9 interrupt me.

10 And you're attempting to resuscitate your
11 initial answer, which was that you didn't do any work
12 for WSG?

13 A. Well, I didn't do any work that was used. I
14 guess that should have been what I should have
15 clarified. And that's actually what Mr. Boydston
16 brought to my attention at the break.

17 Q. Well that wasn't my question.

18 My question was whether or not you did any
19 work for WSG.

20 A. Then I apologize. I misspoke.

21 MR. OLANIRAN: I'm done here.

22 MS. PAGNANELLI: The stipulation --

23 MR. BOYDSTON: Well, we're going to have
24 to have a different stipulation.

25 MS. PAGNANELLI: Okay.

Certificate of Service

I hereby certify that on Wednesday, July 26, 2017 I provided a true and correct copy of the Reply Comments Of MPAA And Program Suppliers to the following:

Commercial Television Claimants, represented by John Stewart served via Electronic Service at jstewart@crowell.com

Allocation Phase Parties, represented by Lucy H Plovnick served via Electronic Service at lh@msk.com

Settling Devotional Claimants, represented by Arnold P Lutzker served via Electronic Service at arnie@lutzker.com

Canadian Claimants Group, represented by Lawrence K Satterfield served via Electronic Service at lksatterfield@satterfield-pllc.com

Joint Sports Claimants, represented by Robert A Garrett served via Electronic Service at robert.garrett@apks.com

Public Broadcasting Service, represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

Signed: /s/ Lucy H Plovnick